Supreme Court, U.S.
FILED
SEP 18 1991
OFFICE OF THE CLERK

NO. 91-548

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

In re: WILLIAM W. CHOATE and all parties similarly situtated;
Petitioner,

VERSUS

THE FEDERAL LAND BANK OF WICHITA,
n/k/a The Farm Credit Bank Of Wichita,
Appellee.

PETITION FOR WRIT OF CERTIORARI

(APPEAL FROM SUPREME COURT OF THE STATE OF OKLAHOMA CASES 86,777; 70,205; and 73,343)

ON APPEAL FROM
THE DISTRICT COURT OF SEMINOLE COUNTY, OKLAHOMA
DISMISSED IN PART AND AFFIRMED IN PART

WILLIAM W. CHOATE pro se,
P. O. Box 65
SEMINOLE, OKLAHOMA 74818
(405) 382-5345

QUESTION PRESENTED FOR REVIEW

I S S U E S

(1) DID THE COURT OF APPEALS FOR THE STATE OF OKLAHOMA DIVISION III IN ITS MEMORANDUM OPINION DATED NOVEMBER 13, 1990 ERROR IN DECISION THAT DENIED PETITIONER WILLIAM W. CHOATE ALL OR PART OF THE FOLLOWING:

(a)(i) THE SAID COURT OF APPEALS HAS DECIDED QUESTIONS OF SUBSTANCE: THAT IS, DIRECT AFFECT UPON MILITARY MEMBER RIGHTS AND SPECIFICALLY CODIFIED FEDERAL REMEDIES: THE QUESTIONS INVOLVE THOUSANDS OF CITIZENS OF THIS STATE WHICH ISSUES HAVE NEVER BEEN DETERMINED HERTOFORE BY THIS COURT: ITS DECISION VESTS IN A FEDERALLY REGULATED LENDER THE RIGHT TO ACCELERATE AND FORECLOSE UPON A REAL ESTATE PROMISSORY NOTE THAT IS NOT IN DEFAULT BY ITS TERMS IN DIRECT CONTRAVENTION OF FEDERAL LAW?

(ii) THE SAID COURT HAS DECIDED SEVERAL QUESTIONS OF SUBSTANCE IN WASY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT?

(iii) THE SAID COURT HAS DEPARTED SO FAR FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO REQUIRE THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION IN THAT SAID COURT OF APPEALS DENIED APPELLANT A STAY OF PROCEEDINGS DUE TO HIS ACTIVE MILITARY DUTY; IT DISMISSED HIS CAUSE PREDICATED UPON A PURPORTED SETTLEMENT WITH HIS CO-DEFENDANT, WHO MERELY PAID TO APPELLEE THE AMOUNT OF DEFICIENCY AWARDED BY THE TRIAL COURT AFTER A FORECLOSURE SALE BUT ON CONDITION OF ASSIGNMENT OF HIS RIGHTS AND REMEDIES TO THE APPELLANT?

NO. _____

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Appellee.

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(Pursuant to Rule 10 et seq. & 28 U.S.C. 1257 a)

COMES now Appellant William W. Choate, pursuant to Rule 10 et seq. and 28 U.S.C. 1257 (a) and Petitions this Court for a writ directing that certiorari be granted to review the Memorandum Opinion of the Court of Appeals, Division III for the State of Oklahoma, filed on Nov. 13,

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RULE 14.1. (e) Jurisdiction shown herein above (supra)

1990 which denied Appellant stay of proceeding in accordance with 50 App. U.S.C. 521. Both the Petition for Rehearing and the Application for Extension of time to file petition for Rehearing on Appellant's Application for Stay was denied on January 28, 1991 and Cetiorari was denied on May 21, 1991 by the Supreme Court of the State of Oklahoma. An extension of time to file this Petition to and including September 18, 1991 was granted by Justice Byron R. White on the 16th of August, 1991 pursuant to Rule 13.6.

Rule 14.1. (b) JOHNNY E. JOHNSON; CAROL E. JOHNSON; FIRST NATIONAL BANK OF SEMINOLE; FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF SEMINOLE; AND THE UNITED STATES OF AMERICA, ex rel. INTERNAL REVENUE SERVICE; STATE OF OKLAHOMA, ex rel.; ROBERT H. HENRY; EDNA B. CHOATE; JOHN I. M. CHOATE AND GRETCHEN L. CHOATE.

STATEMENT OF FACTS

In December 1985, after acknowledging "Loan balance not yet due" on Petitioner's Note of $66,616.82, Appellee called the note for a Balance of $87,886.41 even though unmatured principal payments required by Respondent and Appellant had reduced the loan balance due by amortization to the date November 1992. [even without credit for the default interest charged in error.] Petitioner's Promissory Note had provided for <u>voluntary</u> advance payments by the makers and required that enforcement by the payee be governed by federal law and state law.

In April 1986 the Oklahoma "Moratorium Act" prohibiting foreclosure by the Appellee for one year to permit refinancing or restructuring efforts. At the time Appellant was seeking such refinancing pursuant to 12 U.S.C. 2207(a),

38 U.S.C. 1802 (a) and (d), and under the Farm Credit System Capital Corporation created by the 1985 Farm Credit Act, which was specifically exempted from the "Moratorium Act". The raising of funds from a mortgage on his home, not secured to the Appellee, was denied to Petitioner at the behest of Respondent which denial was not disclosed at that time to Petitioner, on the concealed representation that "he had a 30 - year - loan in default with $88,000 due," when in fact that amount, even if correct, would not be due until October 1992.

Another attempted V.A. "automatically" guaranteed home loan effort was denied directly by the V.A. on November 5, 1986 based on information from credit from source other than credit report." The following week Respondent brought this action for a judgment of $91,867.51, which amount was not due by terms of the Note

sued upon until February 1991. At trial of the matter, the Court sustained objections and demurrer to affirmative defenses and effected what amounted to a directed verdict.

Subsequent to the "alleged" trial and this judgment, the 1987 Agricultural Credit Act imposed additional constraints on Respondent's right to continue enforcement by foreclosure, including (1) prohibition on acceleration where the note terms of amortization had been met [12 U.S.C. 2202 (b) and (c)], (2) forebearance when there exists "any way that will make it probable that the operations of the borrower will become financially viable", and (3) required restructure where the cost of restructure was less than that of foreclosure [12 U.S.C. 2202a(a)(7) and (e)(1), all of which remedies, though invoked, were denied to the Petitioner as well as any

opportunity to repurchase (Sec. 2219a), or to lease the property

Petitioner's research into the regulator's FCA Examination Manual and Congressional hearings revealed that the cause for Appellee's vehement course in impairing Petitioner's preformance lay in its having committed Petitioner's loan as collateral for its bonds which had no call provisions, and by permitting loss of such security by prepayment of its loans, a "postive gap" in collateral position occured which was unacceptable to bond investors. Appellant further documented the categorical denial of access to loan guaranty and other sources of refinancing by his interrogatories to Appellee in the involuntary Chapter 7 proceeding procured by Appellee against him in the United States Bankruptcy Court for the Western District of Oklahoma (88-07174).

The Veterans Administration Board of

Veterans Appeals denied Appellant's request for review of denial of his credit as being without jurisdiction to do so, but in so doing, the dessenting opinion revealed the disposition of the Administration and the Courts to refuse to address or remedy a practice which would "open the flood gates" to many similarly deprived.

On about Feb. 17, 1990 Co-Appellant John Choate filed in the District Court his pleading memorializing his payment of the default judgment, which the Court of Appeals ruled as justification for rendering issues moot.

Having returned to active military duty at locations outside this jurisdiction to support his family, the Petitioner had no ready access to the Court Clerk's files, adequate library facilities, or even his office files. Therefore, he invoked the

relief of 50 App. U.S.C. 521, which was summarily denied him on the premise that Petitioner was a "volunteer" and that he should have been able to get his Commander, a layman in court matters, to execute an affidavit attesting to the adverse affects upon his ability to conduct litigation.

ARGUMENTS

Proposition I: THE COURT OF APPEALS ERRED IN DECIDING QUESTIONS OF SUBSTANCE WITH NO CITATION OF AUTHORITY HERETOFORE DETERMINED BY THIS COURT.

At page 3,line 31 to 34 and page 4, lines 4 to 6 of the Memorandum Opinion (Appendix), the Court asserts the Record contains nothing to support the premise that the advance payments constituted prepayment of the Note

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RULE 14.1. (e), (i), (ii), and (iv) WITH (iii) n/a.

which precluded a concludion of default. The Court of Appeals cited as its only authority the Application for Loan Servicing provision that the partial release consideration "shall be applied on the indebtedness... in such manner as the Federal Land Bank of Wichita may elect." and the Shinn v. Francis, 404 (OK 1965) decision. The Promissory Note clearly provided that the discretion to voluntarily pay in part the principal in advance was granted to the maker, the Petitioner. 12 C.F.R. 614.4510 (d) (1) had made a non-discretionary duty upon Respondent to grant partial release of security when this occured. 12 U.S.C. 2017 had set 85% of appraised value as the loan limit and Respondent's appraisal of $144,000 (while the remaining balance would be $88,000) showed the partial release to be justified without requiring advanced payment on the Note. The Amortization

Schedule showed the rate at which the principal was to be retired according to provisions of the Note.

Loan History prepared by Respondent showed that the Respondent elected to apply the $20,000 as "unmatured principal" and thereafter "billed" or required principal amounts in advance of that provided in the Note sued upon. Therefore, Respondent only required the $20,000 as consideration, which should have been voluntary as to Petitioner according to the Note. Respondent ignored the partial release it was required to give according to federal law, and it also "maintained the improper practice" of requiring payments on principal not due according to terms of the Note. The Court of Appeal's opinion only addresses the first $20,000 and neglects to speak to or acknowledge the periodic advance principal billed and paid thereafter for

an additional five years.

The State Appeals Court asserts that the issue of prepayment was first raised after the judgment, no evidence of it being uncontroverted is alluded to. Petitioner's testimony (e.g. Vol. 1, page 150 of the Trial Record) demonstrates that from the very beginning in 1979, he relied on agricultural financing to allow advance payment to permit compliance with the Note Schedule.

The Shinn case is relied on for authority that the Court on appeal is not to weigh but to examine evidence to determine whether there is competent evidence to support the jury findings. In this case, by uncontroverted testimony of Respondents' Manager of Mortgage loan Accounting at page 97, Volume 1 of the Trial transcript, the $84,694.90 declared by Respondent as due after

payment made subsequent to the Notice of Call balance shown on page 8 of the Loan History and would not be due by amortization until January 1994. Therefore, although a jury might find an amount owing, that doesn't necessarily make it past due or in default, which is a question to be determined as a matter of law by the instrument provisions as executed. The Court cites no authority for a conclusion of law that a note can be determined to be in default even though the principal is paid sufficiently in advance so that even adding purported default interest leaves a total balance still less than that agreed on in the Note calculated to the Notice of Call or the filing of the Petition.

As cited in Petitoner's Brief in Chief, the case of Sentinal Acceptance Corp. v. Colgate, 424 P2d 380 stated: (Co. 1967).

"When the evidence consists of written documents,we are not bound by the trial court's findings relative thereto.

and in Beth-June, Inc. v. Wil-Avon Merchandise, 233 A2d 620, (Pa.1967), it was said:

"We hold that if a mortgage is to seek a premium or penalty upon prepayment, it must specifically provide therefore in the mortgage instrument. [cited in 532 P2d 758]

Not only does the instant Mortgage fail to provide a penalty for prepayment, the Note grants to Petitioner the option ["may"] of such prepayment. Therefore, the question is on of law as set forth in the provisions, not one of fact in the jurors' perception of the parties relationship. The Court in its Opinion asserts that petitioner admitted to being in default. "Default in paying as billed" is not the same as "default in payment as due under the terms of the Note sued on." At page 158 of the Trial transcript, Petitioner answered

the question and did clearly raise the advanced payments issue. At Page 159, Vol. 1 of the Trial transcript, for example, the Court refers to "the creditors is always right" standard.

Clearly, it is because of such abuses that the statute of frauds protects people from verbal "commitments' being procured to nullify written agreements. The Court of Appeals was not asked to weigh evidence for finding of fact justification, but rather to examine it for the applicable matters of law ignored herein which made the Trial Court's judgment and the Court of Appeals affirmance of the same inconsistent with the terms of the instrument sued upon.

50 App. U.S.C. 521 provides:

"At any stage thereof any action or proceeding in any court in which a

person in military service is invoked, either as plaintiff or defendant, during the peroid of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act [section 501 to 591 of this Appendix], unless, in the opinion of the court, the ability of plaintiff to prosecute the action of the defendant to conduct his defense is not materially affected by reason of his military service. (emphasis added)

In its Order denying Petitioner's Application for Stay, the Court of Appeals not only read into this provision that it pertained to "involuntary" service, but also in quoting the "relevant part", the Court omitted "on its own motion. The "shall" condition was met by Petitioner's application.

Proposition II: THE COURT OF APPEALS ERRED IN THE APPEAL IN A WAY NOT IN ACCORD WITH DCISIONS OF THIS

COURT OR OF THE SUPREME COURT OF THE UNITED STATES AS TO RIGHTS OF BORROWERS WHO ARE IN THE MILITARY SERVICE.

At page 5, the Court of Appeals Opinion states that the purpose of the Attorney General intervention was to defend the Moratorium Act, but when that law was found to be unconstitutional, that function ended. The only authority cited is Federal Land Bank Of Wichita v. Story, 756 P2d 588 (OK 1988).

It is true that both the filing of this case and the trial were during the statutory moratorium period, but as quoted in the Story case, the Moratorium Act specifically exempted the Captial Corporation from the foreclosure prohibition. It was exactly that loan guaranty refinancing pursuant to 12 U.S.C. 2012 (20) and 2207 that Petitioner was attempting to use under the 1985 Farm

Credit Act as applied to Veterans Administration loan guaranty on his own home which was not secured to the Respondent but which was sufficient to pay off the balance claimed by Respondent.

It is significant that the Story case refers to the purpose of the Moratorium Act as being prompted by economic conditions. In the U. S. House of Representatives Subcommittee on Agriculture and related agencies appropraitions on April 23, 1986, less than one month before the Moratorium Act was to become effective, at page 941 of the Congressional Record (page 2, Exhibit M), the Chief Economist for the regulator of this Respondent testified:

...the creation of the Farm Credit Capital Corporation by Congress late last year was designed exactly to help stabilize against that dumping [of rural properties on the economy].

On July 17, 1989 the Respondent filed its Answer to Requests for Admissions in the

Adversary proceeding it had brought against the petitioner in U.S. Bankruptcy Court for the Western District of Oklahoma, Case 88-07174-TS, Adv. 89-54 (Exhibit N) in which it admitted that Petitioner was invoking the Capital Corporation refinancing at the time the foreclosure action was being prosecuted and that

> ...not one single borrower in the entire [appellee's] District of four states was allowed that service by sale of his account to that entity.

However, the Attorney General either neglected or did not understand the role of the Capital Corporation in acquiesing to withdrawal on the basis of unconstitutional interference with contract. Therefore, this Court should not apply a standard to the instant case which did not apply by its factual circumstances, to wit: the moratorium should have been allowed to make sure the Capital Corporation relief was not

categorically denied.

On page 5, lines 17 to 21 of the Opinion, the Court of Appeals asserts the issue of the Veterans Administation was not preserved for appeal, citing Reeves v. Melton, 518 P.2d 57, 64 (OK Ap. 1974), which case ruled alleged errors were not properly preserved for appeal because that Appellant had not both requested and excepted to instructions.

In this case, the Application for New Trial followed the format of allowable causes as listed in the statute which pertained, the Veterans Administration being party to the imparment of his performance by denial of his automatically guaranteed home loan right for refinancing but no claim of money damage was being made against the V. A. only affirmative defenses as they apply to 38 U.S.C. 1820. Prior to trial, the

Court had disallowed making VA a party to the case, although the initial Answer had included this Cross-Claim.

At trial, the Record shows multiple objections by Appellee to the admission of testimony into evidence of V. A. officials, to which Appellant excepted and was allowed to do so by the trial court, making offers of proof.

Finally, the trial court sustained Appellee's demurrer to Appellant's entire case of defense and counter-claim, so that no instructions thereon were permitted to the jury.

Appellant urges that the issues of impairment of his performance and denial of his statutory rights as involve both the Appellee and the Veterans Administration as alluded to in 12 U.S.C. 2207 were repeatedly invoked both by

pleading and in open court. This appeal merely asks that the case be remanded with instructions to allow the consideration by the jury of the issues of his performance being impaired and his rights denied to orchestrate the foreclosure; in addition thereto, the 1987 consideration for restructuring raised factual issues in 12 U.S.C. 2202a(a)(7), (e)(1), and 2202d(b) and (c) which should be considered by the trier of fact.

It is a common maxim in the law that the nomenclature itself of the legal theory to be invoked is not itself a conclusion that must be pled, but rather, the factual basis upon which the legal theory can be applied must be disclosed. Appellants' pleadings making frequent reference to accounting, statutory, and regulatory controls, and undue impositions made by Appellee due to its

own precarious position regarding collateralization of its bonds give this premise. The Court of Appeals indicates that the Record is devoid of reference to evidence that Appellants' Note and Mortgage were instruments of security for Appellee's bonds. However, Appellant offered into evidence the records of proceedings reporting the regulators' explanations of the bond problem precipitating the economic problem and the denial of loan guaranty access to refinancing. Then after the trial it was disclosed that the regulator had an examination manual which stated that those bonds were secured by the loans made (page 1, Exhibit M), which quotation has previously been pled.

Therefore, adequate evidence exists for justifying referral of the matter to trier of fact upon the issue of trust treatment or other accountability. A

page 20 of the U.S. Senate hearing, ibid. (S.H.99-974) the FCA Chairman, Frank Naylor had said," ... it is the responsibility of the lender... to consider how they might help loans on a case-by-case basis." Obviously, it is the lender, not the borrower who is on distribution for explanatory material from regulators. However, the "case-by-case" approach resulted in not one single borrower being allowed access to the capital corporation relief, in Appellee's District.

Proposition III: THE COURT OF APPEALS ERRED IN DEPARTING SO FAR FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

On page 2, line 16 to 21 of the Court's Memorandum Opinion, it is asserted that any issue related to the dismissed parties is now moot and that

Petitioner William W. Choate was not substituted for John Choate in any cause. This decision is predicated upon a multi-purpose pleading purported to be a settlement by which Respondent released the said John Choate and his wife.

As shown in Exhibit P, said co-appellant filed in the District Court a pleading by which he memorialized payment of the Deficiency Judgment and made that payment subject to assignment of his rights and claims to William Choate.

12 O.S. 2010(D) specifically allows for assignment of claims in contract disputes. Although the Court of Appeals characterizes the payment and dismissal as voluntary, the fact that an in personam deficiency judgment had been entered gave the appellant little choice. In paying the full amount of the judgment and removing himself from the case lest

further assessments were made, no compromise as to him was made on the part of the appellee. There is nothing in the Record that John Choate executed that sets forth release of his claims against the Respondent or in any other manner dismissing such claims, which were preserved by assignment to the remaining Petitioner William Choate. Therefore, the "settlement" was one of satisfying the deficiency judgment, not releasing claims.

On page 2, lines 25 to 29, the Court declined to review Petitioner's mental Brief as having been filed without leave of Court and as not containing any allegation of error. Both these issues are discussed in Petitioner's Response filed 24 September, 1990 to the Court's Order to show cause why the amended petitions should not be dismissed for failure to procure such leave of court.

It was pointed out that Rule 1.17 was invoked, but more significantly, Rule 1.18(c) was invoked because the instruction to consolidate in the same appeal multiple decisions applied here. In this case, the judgments on the Note and foreclosure had been entered in 1987, but on January 6, 1988 the 1987 Agricultural Credit Act prohibiting continuing foreclosure proceedings until consideration for restructuring had been completed went into effect.

12 O.S. 991(b) states:

> If a motion for a new trial be filed and a new trial be denied, the movant may not, on the appeal, raise allegations of error that were available to him at the time of the filing of his motion for a new trial but were not therein asserted.

Petitioner's Application for New Trial filed 23 April 1987, over eight months before the new Act with the additional rights went into effect. Compliance with

the restructuring requirements was specifically addressed in the amended Petitions in Error, to wit: the required calculations comparing foreclosure and restructuring costs which were not made, the repurchase right without having to pay in advance beyond what the Note required, and the forebearance in any manner to "make it probable that the operations of the borrower will become financially viable", all of which were categorically denied. (see 12 U.S.C. 2202a(a)(7),(b)(3), and (e)(1).

At trial, Petitioner entered uncontroverted testimony into evidence of his open, notorious, and hostile access over the property at issue to his land-locked home property from 1971. The purchase of the property at issue was in 1979. Therefore, the period of use pre-dated by eight years even the purchase. The right-of-way filing

complained of was in 1986, a few weeks before the filing of this case below, but that filing was required by a prospective V.A. lender as a condition for granting the loan to settle Respondent's claim, and the issue of disputing facts over the easement was not raised either by pleading responding to Petitioner's Answer or at the trial.

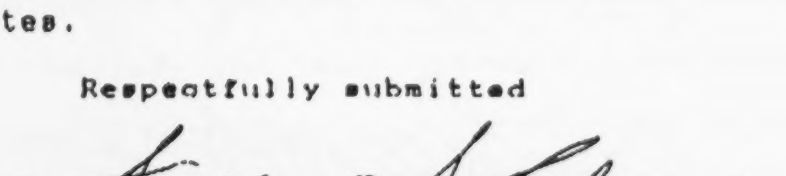
In his brief in chief, Petitioner has cited his autorities for maintaining entitlement to access to his homestead property. The filing of the right-of-way at the behest of a supposed lender should not be construed now as Petitioner self proclaimed legalization of his prescriptive use. In fact, from the Affidavit filed in this Court in March 1989 showing the several times the V.A. and the Respondent coordinated efforts to deny to Petitioner access to refinancing, it now appears the

requirement for the right-of-way filing may have been from the Respondent whose interests V.A. was serving.

CONCLUSION

Premises considered Petitioner prays this Court for a writ accepting review of the Court of Appeals Opinion and publication of its decision. From media reports there are significant numbers of borrowers continuing to encounter the problems alluded to in this case, and such individuals need access to settled law on these issues in planning their estates.

Respectfully submitted



WILLIAM W.CHOATE
Petitioner pro se,
P.O. Box 65
Seminole, Oklahoma 74818
(405) 382-5345

VERIFICATION

STATE OF INDIANA)
) ss:
COUNTY OF Miami)

I, WILLIAM W. CHOATE, upon being first duly sworn, being of sound mind and not under any coercion, upon oath state as follows:

(1) I have read the PETITION FOR WRIT OF CERTIORARI, as well as its content and I believe that all of same is true to my best knowledge and belief.

(2) I further state that the Appendix to this brief will be forwarded A.S.A.P. under separate cover and that I could not with due diligence, done any better at this time.

William W. Choate
WILLIAM W. CHOATE

SUBSCRIBED AND SWORN TO BEFORE ME THIS 16 DAY OF SEPTEMBER, 1991.

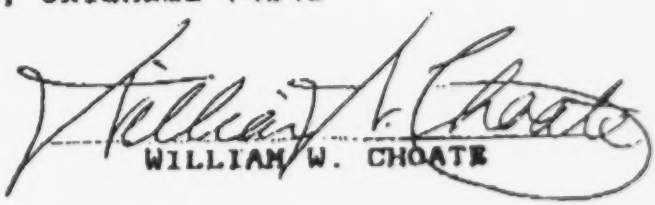
William C. Lud A.
(SEAL) NOTARY PUBLIC

MY COMMISSION EXPIRES: 1/16/94

CERTIFICATE OF SERVICE

William W. Choate, the undersigned, Petitioner, pro se, hereby certifies that he caused to be deposited in the United States Mail, Postage prepaid, Forty (40) like copies of the PETITION FOR WRIT OF CERTIORARI, to the CLERK OF THE SUPREME COURT OF THE UNITED STATES, 1 First Street, N.E., Washington, D.C. 20543; and to:

Mr. Stanley Huser, Jr.,
Box 511,
Holdenville, Oklahoma 74848



Appendix to follow:

NO. 91-548 (2)

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APPENDIX

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APPENDIX

NOT FOR PUBLICATION
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DIVISION III

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versus	Case Number 69,777 Consolidated with Cases 70,205 and 73,343.
WILIAM W. CHOATE, EDNA B. CHOATE, JOHN I. M. CHOATE, and GRETCHEN L. CHOATE, Appellants,	
and,	
JOHNNY E. JOHNSON, CAROL C. JOHNSON, FIRST NATIONAL BANK OF SEMINOLE, FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF SEMINOLE, AND THE UNITED STATES OF AMERICA, ex rel. INTERNAL REVENUE SERVICE, Defendants,	
and	
STATE OF OKLAHOMA, ex rel. ROBERT H. HENRY, ATTORNEY GENERAL OF OKLAHOMA, Intervenor.	

APPEAL FROM THE DISTRICT
COURT OF SEMINOLE COUNTY OKLAHOMA

HONORABLE GORDON R. MELSON, JUDGE
DISMISSED IN PART AND AFFIRMED IN PART

William W. Choate,
Seminole, Oklahoma, pro se,

Stanley Huser, Jr.,
Holdenville, Oklahoma. For Appellee

MEMORANDUM OPINION

Opinion by Carol M. Hansen, Judge:

This appeal is a consolidation of three appeals. In addition, Appellants filed three "Amended" Petitions In Error. However, only issues raised in the initial Petition In Error remain under consideration. The first appeal is from the trial court's judgment on a jury verdict. The second Petition In Error alleges error by the trial court in settling the journal entry of judgment on the jury verdict. Appellants brief on issue contained in the second Petition in Error which is not duplicative of issues raised in the first Petition in Error. The third consolidated appeal was in the name of John I.M. Choate only.

John Choate filed with this Court a multi-purpose pleading which, inter alla, notes he had settled the case with Appellee and that Appellee "released forever John or Gretchen Choate". Further, it purports to design John Choate's rights of appeal to William Choate and to substitute William Choate as the Appellant in the third appeal. Reading John Choate's pleading as a whole, we consider it to be, in effect, a motion to dismiss the consolidated appeal as to John and Gretchen Choate. Appellee expressly stated it had no objection to dismissal as to John and Gretchen. Accordingly, this appeal is dismissed as to John I. M. Choate and Gretchen L. Choate only. In view of the voluntary dismissal, any issue relating to the dismissed parties is now moot. Thus, no appeal rights remain to be transferred to the remaining appellants. Finally, because the third appeal was consolidated

with this appeal, there is no cause in which William Choate could be substituted as appellant.

The three "Amended" Petitions in Error, and Appellant Supplemental" Brief, pertain to trial court post-judgment determinations on a variety of motions. All three Amended Petitions were filed subsequent to completion of briefing by both parties, without leave of court, in violation of Rule 1.17, Rules of Appellate Procedure in Civil Cases, 12 O. S. 1981 Chap. 15, App. 2. Further, none of these petitions contains any allegation of error. It is a long standing and well established rule that Oklahoma appellate courts will not consider errors argued in briefs which are not presented by petition in error. Martin v. Harrah Independent School District, 543 P. 2d 1370 (Okla. 1975); Southwestern Cotton Seed Oil Co. v. Bank of Stroud, 12 Okl. 168, 70 P. 205 (Okla.

1902). Accordingly, we decline review of the errors alleged in Appellants' Supplemental Brief.

Appellants have four remaining propositions, which we will consider as presented. Appellants' allegations and arguments tend to be both disjointed and somewhat cryptic. Therefore, we are constrained to address what we understand to be the essence of the stated proposition.

The primary subject of this appeal is a promissory note executed by William and John Choate, (Choates), evidencing a loan is the Choates by Appellee (FLB). To secure this loan, Choates and their wives executed a mortgage on 360 acres of land. Subsequently, Choates made a lump sum payment of $20,000 to FLB. The purpose of this payment, and its effect on the loan, is a major point of contention. FLB treated the payment as consideration for release of 80 of the

360 acres pledged under the mortgage. They reduced the principal in the amount paid, but left the amount of the payments as they were. The reduction in principal would have resulted in an earlier payout and effectively reduce the term of the loan. Choates argue that the $20,000 constituted advance payment of principal in the periodic payments required under the terms of the loan, keeping the loan current several years into the future When Choates did not make payments as required by FLB, FLB declared the loan in default and brought this action to recover on the note and for foreclosure of the mortgage. The jury verdict found the note to be in default and awarded money judgment to FLB.

Choates first allege error in the trial court granting judgment on the jury verdict, arguing the note was never in default. In support of this position, they contend the $20,000 payment paid the principal ahead 13 years. Choates do not contend they were current in the payments

principal ahead 13 years. Choates do not contend they were current in the payments as demanded by FLB, only that such payments were not required in view of the "advance" $20,000 and that they were inconsistent with the note, which they argue had no acceleration clause. We find no support in the record for Choates' position. The note clearly provides for acceleration of the entire debt under the conditions set forth in the mortgage document, which is incorporated into the note by reference. The mortgage provides the secured debt will become due in the event mortgagor defaults with respect to any covenant or condition of the mortgage. One of the covenants in the mortgage is "...to pay when due all payments provided in the note secured hereby,". In the absence of timely periodic payments. Choates attempt to rely on the $20,000 lump sum payment to establish they were not in default.

Once again, the record does not support this position. Choates executed and submitted to FLB an Application for Loan Servicing on which they marked a box indicating they were applying for a "partial release" under the present loan. That application further contains the following statement:

> It is understood and agreed that the amount paid in consideration for granting the partial release ... shall be applied on the indebtedness secured by aforesaid mortgage in such manner as the Federal Land Bank of Wichita may elect.

The application form reflects approval, "provided $20,000 is applied to principal of loan". Choates' loan history, which they introduced, shows that the principal was reduced by the amount of the payment, less fees and interest, and that the amount on which

interest was computed was likewise reduced. The amount of principal reduction in each payment was increased. This method of recomputation was testified to by FLB's employee. Not only does the record fail to support Choates' argument, their own actions are inconsistent with a position that their payments were made in advance. The record contains a series of notifications of past due installments and correspondence from William Choate stating his intention to bring the loan "current". Choates did not present the advance payment argument until after this action was filed in the trial court.

In an action at law, the findings of the jury will not be disturbed on appeal if there is any competent evidence to support its findings. Shinn v. Francis, 404 P. 2d 1017,1021 (Okla.1965). The jury verdict granting judgment of default of the promissory note is fully supported by the record.

the record.

Choates' second and third propositions are more easily disposed of. The second alleges the trial court erred in disallowing intervention by the Oklahoma Attorney General to defend the constitutionality of the so-called "Moritorium Act", barring foreclosure against farmers for one year. We share Appellee's confusion regarding this allegation because the Attorney General was allowed to intervene on the only basis on which intervention was sought to convince the trial court to impose the moritorium. The court refused, declaring the law to be unconstitutional and proceeded with the case. The Attorney General withdrew from the case after the Oklahoma Supreme Court found the moritorium law to be unconstitutional. Federal Land Bank of Wichita v. Story. 756 P. 2d 588 (Okla. 1988). There is no perceived error and we will consider the intervention issue no further.

As the third proposition, Choates contend the trial court erred in overruling a motion to make the Administrator of the Veterans Administration a third party defendant. Without discussing the substance of the motion, we find Choates failed to preserve this alleged error for appeal by not including it in their timely motion for new trial. Appellants may not raise allegations of error which were available on filing a motion for new trial, but which were not asserted. 12 O. S. 1981 §991(b); Reeves v. Melton, 518 P.2d 57,64 (Okla. App. 1974).

Choates' fourth proposition contains two separate and unrelated allegations of error. The first of these allegations claims error in finding Choates had not established a prescriptive easement over the mortgaged land, which would have given them access to "Homestead

property", which is apparently not part of the land in question. Shortly before they filed this action in the trial court, Choates recorded a document purporting to grant an easement to themselves. Choates claim continual, exclusive, open and hostile use of a "right-of-way" since 1971. However, this use was over their own property. Such a claim is patently unmeritorious. An easement by prescription may be gained only by adverse, not permissive, use. Zimmerman v. Newport, 416 P.2d 622 (Okla. 1966); Schwab v. Menz, 376 P.2d (Okla. 1962). Choates provide no enlightenment as to how their use could be considered hostile or adverse. The trial court did not err in finding that any right, title or interest Choates may have in the "right-of-way" is junior and inferior to the rights of FLB.

Choates also allege error in relation to "trust claims". Choates contend in their brief that FLB assumed the role of their agent or trustee:

> ... in unilaterally without disclosure otherwise to them, undertaking to not only obligate their loan as collateral for securities themselves having no call provisions and necessitating obstructing their absolute loan guaranty rights as war veterans...

There is nothing in the record to show FLB ever obligated Choates' mortgage, or that FLB did not have a legal right to do so if it

had wished. Further, Choates' "trust" theory raised in its Answer and at trial related to a resultant or constructive trust allegedly created by the excessive amounts paid after the lump sum payment discussed above. The arguement was that the "excess" amounts in the periodic payments should have been considered held in trust. We can discern nothing in Choates' brief which leads us to conclude the arguement is directed to that theory. Choates may not raise this new theory for the first time on appeal. Home-Stake Production Company v. Minnis, 443 P.2d 91,99 (Okla. 1968).

For the foregoing reasons, subject to the DISMISSAL ordered above, the trial court's judgment is AFFIRMED.

GARRETT, P.J. and HUNTER, V.C.J. concur.

THE COURT OF APPEALS OF THE STATE OF OKLAHOMA
Division III

THE FEDERAL LAND BANK OF WICHITA Appellee, versus WILLIAM W. CHOATE, EDNA B. CHOATE, JOHN I.M.CHOATE AND GRETCHEN L. CHOATE Appellants.	Case Number 69,777

O R D E R

Appellants' Application for Stay of Proceedings with Authorities, filed November 26,1990, asked this Court to stay further proceedings pursuant to the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. app. §501 et seq. Appellants contend they are entitled to such stay pending termination of Appellant William Choate's period of temporary active duty service with the United States Air Force, specifically citing 50 U.S.C. app. §521. That section, in relevant part, provides:

> At any stage thereof any action or proceeding in any court in which a person in military service is involved... may, in the discretion of the court in which it is pending, ... be stayed... unless, in the opinion of the court, the ability of the plaintiff to prosecute the action,... is not materially affected by reason of his military service.

On November 27, 1990, this Court, under the authority of Rule 3.9, Rules on Practice and Procedure in the Court of Appeals, 12 O.S. 1984 Supp. Chap. 15, App. 3, granted Appellants an extension of twenty days in which to file a petition for rehearing. The extension is in

addition to the twenty days allowed by court rules. The November 27 order, however, deferred consideration of Appellants' application for stay pending further documentation and directed Appellants to provide copies of William Choate's military orders and an affidavit from his military commander verifying that William Choate's military service materially affected his ability to prosecute this action.

On November 29, 1990, Appellee filed its Response to Application for Stay of Proceedings objecting to a stay. Appellee contends Appellants were repeatedly granted continuances in the trial court on the same grounds presented here; that William Choate's service did not, and does not now, materially affect his ability in this case, and that the application for stay is being used for the purpose of delay.

On December 11, 1990, Appellants filed their Appellants' Response to Order of 27 Nov 90, stating the military orders and certification of duty were to be forwarded by separate letter to the Court. On or about December 12, 1990, this Court received a letter from Appellant William Choate, with attached copies of his military orders. In the letter, Appellant notes he will not provide this Court with the affidavit of his military commander. Appellant first argues it would be impractical because of distance and time to do so. He further contends that because it is the statutory duty of the Court to opine

whether he is materially affected by his military service, it would be improper for the Court to consider the "opinions" of either the commander or Appellee.

William Choate's military orders reveal that he has been ordered to temporary active duty at Carswell Air Force Base, Texas, for the period December 10 - December 21, 1990, and that he served at Grissom Air Force Base, Indiana, from November 5 - December 6, 1990. The orders further reveal he serves as a voluntary individual augmentee assisting in the provision of various legal services at the base level.

In view of Appellants' decision not to comply with the order to provide the verifying affidavit, the only support for Appellants' application, is the military orders and William Choate's conclusional assertions.

The Soldiers' and Sailors' Civil Relief Act is not construed to require a stay of proceedings on the mere showing that a service member is on active duty, even at a location away from his or her residence. Boone v. Lightner, 319 U.S.561, 63 S.Ct. 1223, 87 L.Ed.1587 (1943); Huckaby et al v. Oklahoma Office Building Co., 201 Okla. 141, 202 P.2d 996 (1949). In some cases, the duty location and military circumstances may create a presumption that ability to prosecute or defend an action is materially affec-

ted, but that is not the case here. A stay is not a matter of right, but is within the discretion of the Court. This "discretion" includes the discretion as to whom or what the Court may ask to be presented in order to make a fair judgment. Boone v. Lightner, at p. 1229.

Although William Choate is acting pro se, in the absence of the requested verification by his military commander, we are not convinced his military service in Texas will materially affect Appellants' ability to meet the filing schedule as modified by this Court's extension. We do not intend to denigrate either his service, or the contribution William Choate may be making to the resolution of legal problems at the military base level. However, we discern nothing to lead us to conclude that his presence at the place of temporary duty is of such vital interest to national security that he could not be spared sufficient time to prepare a petition for rehearing, if he chooses to do so. We also find he could have provided the ordered affidavit verifying his service, and that this Court's directing production of the affidavit was proper.

Appellants' Application for Stay of Proceedings is therefore DENIED.

This determination precludes the necessity for further response by Appellee to the appli-

cation for stay.

DONE BY ORDER OF THE COURT OF APPEALS this 20th day of December, 1990.

[signed]
CAROL M. HANSEN, JUDGE

HUNTER, V.C.J. and GARRETT, P.J. concur

CERTIFICATE OF SERVICE

William W. Choate, the undersigned, Petitioner, pro se, hereby certifies that he caused to be deposited in the United States Mail, Postage prepaid, Forty (40) like copies of the Appendix to the Petition for Writ of Certiorari (previously filed), to the Clerk of the Supreme Court of the United States, 1 First Street, N.E., Washington, D.C. 20543; and to:

Mr. Stanley Huser, Jr.
P. O. Box 511
Holdenville, OK 74848

William W. Choate
WILLIAM W. CHOATE

Dated: 30 Sept. 1991

FILED
NOV 1 1991
OFFICE OF THE CLERK

(3)

CASE NO 91-548

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

WILLIAM W. CHOATE, PETITIONER
versus
THE FEDERAL LAND BANK OF WICHITA,
NKA THE FARM CREDIT BANK, RESPONDENT.

PETITION OF WRIT OF CERTIORARI
TO THE SUPREME COURT TO
THE STATE OF OKLAHOMA

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

*G. Blaine Schwabe, III
***Counsel of Record**
Mary S. Robertson
MOCK, SCHWABE, WALDO,
ELDER, REEVES & BRYANT
A Professional Corporation
Fifteenth Floor
One Leadership Square
211 North Robinson Avenue
Oklahoma City, OK 73102

Stanley Huser, Jr.
104 North Broadway
P. O. Box 509
Holdenville, OK 74848-0511

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NOT FOR PUBLICATION

THE COURT OF APPEALS OF THE STATE OF OKLAHOMA

Division III

THE FEDERAL LAND BANK OF WICHITA,	)	
Appellee,	)	
versus	)	
WILLIAM W. CHOATE, EDNA B. CHOATE, JOHN I.M. CHOATE and GRETCHEN L. CHOATE,	)	Case Number 69777 Consolidated with Cases 70,205 and 73,343.
Appellants, and,	)	
JOHNNY E. JOHNSON, CAROL E. JOHNSON, FIRST NATIONAL BANK OF SEMINOLE, FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF SEMINOLE, AND THE UNITED STATES OF AMERICA, ex rel INTERNAL REVENUE SERVICE,	)	Filed Court of Appeals State of Oklahoma November 13, 1990 James W. Patterson
Defendants, and,	)	

STATE OF OKLAHOMA, ex rel ROBERT H. HENRY, ATTORNEY GENERAL OF OKLAHOMA,

Intervenor.

APPEAL FROM THE DISTRICT COURT OF SEMINOLE COUNTY, OKLAHOMA

HONORABLE GORDON R. MELSON, JUDGE

DISMISSED IN PART AND AFFIRMED IN PART

William W. Choate, Seminole, Oklahoma — Pro Se,

Stanley Huser, Jr., Holdenville, Oklahoma, — For Appellee.

MEMORANDUM OPINION

Opinion by Carol M. Hansen, Judge:

This appeal is a consolidation of three appeals. In addition, Appellants filed three "Amended" Petitions in Error. However, only issues raised in the initial Petition in Error remain under consideration. The first appeal is from the trial court's judgment on a jury verdict. The second Petition in Error alleges error by the trial court in settling the journal entry of judgment on the jury verdict. Appellants brief no issue contained in the second Petition in Error which is not duplicative of issues raised in the first Petition in Error. The third consolidated appeal was in the name of Appellant John I.M. Choate only.

John Choate filed with this Court a multi-purpose pleading which, inter alia, notes he had settled the case with Appellee and that Appellee "released forever John or Gretchen Choate". Further, it purports to assign John Choate's rights of appeal to William Choate and to substitute William Choate as the appellant in the third appeal. Reading John Choate's pleading as a whole, we consider it to be, in effect, a motion to dismiss the consolidated appeal as to John and Gretchen Choate. Appellee expressly stated it had no objection to dismissal as to John and Gretchen. Accordingly, this appeal is dismissed as to John I.M. Choate and Gretchen L. Choate only. In view of the voluntary dismissal, any issue relating to the dismissed parties is now moot. Thus, no appeal rights remain to be transferred to the remaining appellants. Finally, because the third appeal was consolidated with this appeal, there is no cause in which William Choate could be substituted as appellant.

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ments tend to be both disjointed and somewhat cryptic. Therefore, we are constrained to address what we understand to be the essence of the stated proposition.

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Choates first allege error in the trial court granting judgment on the jury verdict, arguing the note was never in default. In support of this position, they contend the $20,000 payment paid the principal ahead 13 years. Choates do not contend they were current in the payments as demanded by FLB, only that such payments were not required in view of the "advance" $20,000 and that they were inconsistent with the note, which they argue had no acceleration clause. We find no support in the record for Choates' position. The note clearly provides for acceleration of the entire debt under the conditions

set forth in the mortgage document, which is incorporated into the note by reference. The mortgage provides the secured debt will become due in the event mortgagor defaults with respect to any covenant or condition of the mortgage. One of the covenants in the mortgage is "...to pay when due all payments provided in the note secured hereby.". In the absence of timely periodic payments, Choates attempt to rely on the $20,000 lump sum payment to establish they were not in default. Once again, the record does not support this position. Choates executed and submitted to FLB an Application for Loan Servicing on which they marked a box indicating they were applying for a "partial release" under the present loan. That application further contains the following statement:

> It is understood and agreed that the amount paid in consideration for granting the partial release ... shall be applied on the indebtedness secured by aforesaid mortgage in such manner as the Federal Land Bank of Wichita may elect.

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In an action at law, the findings of the jury will not be disturbed on appeal if there is any competent evidence to support its findings. *Shinn v. Francis*, 404 P.2d 1017,1021 (Okla. 1965). The jury verdict granting judgment on default of the promissory note is fully supported by the record.

Choates' second and third propositions are more easily disposed of. The second alleges the trial court erred in disallowing intervention by the Oklahoma Attorney General to defend the constitutionality of the so-called "Moritorium Act", barring foreclosure against farmers for one year. We share Appellee's confusion regarding this allegation because the Attorney General was allowed to intervene on the only basis on which intervention was sought, to convince the trial court to impose the moritorium. The court refused, declaring the law to be unconstitutional, and proceeded with the case. The Attorney General withdrew from the case after the Oklahoma Supreme Court found the moritorium law to be unconstitutional. *Federal Land Bank of Wichita v. Story*, 756 P.2d 588 (Okla. 1988). There is no perceived error and we will consider the intervention issue no further.

As the third proposition, Choates contend the trial court erred in overruling a motion to make the Administrator of the Veterans Administration a third party defendant. Without discussing the substance of the motion, we find Choates failed to preserve this alleged error for appeal by not including it in their timely motion for new trial. Appellants may not raise allegations of error which were available on filing a motion for new trial, but which were not asserted. 12 0.5. 1981 991(b); *Reeves v. Melton*, 518 P.2d 57,64 (Okla.App. 1974).

Choates' fourth proposition contains two separate and

unrelated allegations of error. The first of these allegations claims error in finding Choates had not established a prescriptive easement over the mortgaged land, which would have given them access to "homestead property", which is apparently not part of the land in question. Shortly before they filed this action in the trial court, Choates recorded a document purporting to grant an easement to themselves. Choates claim continual, exclusive, open hostile use of a "right-of-way" since 1971. However, this use was over their own property. Such a claim is patently unmeritorious. An easement by presription may be gained only be adverse, not permissive use. *Zimmerman v. Newport*, 416 P.2d 622 (Okla. 1966); *Schwab v. Menz*, 376 P.2d 276 (Okla. 1962). Choates provide no enlightenment as to how their use could be considered hostile or adverse. The trial court did not err in finding that any right, title or interest Choates may have in the "right-of-way" is junior and inferior to the rights of FLB.

Choates also allege error in relation to their "trust claims". Choates contend in their brief that FLB assumed the role of their agent or trustee:

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There is nothing in the record to show FLB ever obligated Choates' mortgage, or that FLB did not have a legal right to do so if it had wished. Further, Choates' "trust" theory raised in its Answer and at trial related to a resultant or constructive trust allegedly created by the excessive amounts paid after the

lump sum payment discussed above. The argument was that the "excess" amounts in the periodic payments should have been considered held in trust. We can discern nothing in Choates' brief which leads us to conclude the argument is directed to that theory. Choates may not raise this new theory for the first time on appeal. *Home-Stake Production Company v. Minnis*, 443 P.2d 91,99 (Okla 1968).

For the foregoing reasons, subject to the DISMISSAL ordered above, the trial court's judgment is AFFIRMED. GARRETT, P.J. and HUNTER, V.C.J. concur.

THE COURT OF APPEALS OF
THE STATE OF OKLAHOMA

Division III

THE FEDERAL LAND BANK OF WICHITA, Case No. 69,777 Appellee,	)	
	)	Case No. 69,777
versus	)	
	)	Filed
WILLIAM W. CHOATE, EDNA B. CHOATE, JOHN I.M. CHOATE AND GRETCHEN L. CHOATE,	)	Court of Appeals State of Oklahoma December 20, 1990 James W. Patterson Clerk
Appellants.	)	

ORDER

Appellants' Application for Stay of Proceedings with Authorities, filed November 26, 1990, asked this Court to stay further proceedings pursuant to the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. app. 501 et seq. Appellants contend they are entitled to such stay pending termination of Appellant William Choate's period of temporary active duty service with the United States Air Force, specifically citing 50 U.S.C. app. 521. That section, in relevant part, provides:

> At any stage thereof any action or proceeding in any court in which a person in military service is involved..may, in the discretion of the court in which it is pending,..be stayed.., unless, in the opinion of the court, the ability of the plaintiff to prosecute the action, is not materially affected by reason of his military service.

On November 27, 1990, this Court, under the authority of Rule 3.9, Rules on Practice and Procedure in the Court of Appeals, 12 O.S. 1984 Supp. Chap. 15, App. 3, granted Appellants an extension of twenty days in which to file a petition for rehearing. The extension is in addition to the twenty days allowed by court rules. The November 27 order, however, deferred consideration of Appellants' application for stay pending further documentation, and directed Appellants to provide copies of William Choate's military orders and an affidavit from his military commander verifying that William Choate's military service materially affected his ability to prosecute this action.

On November 29, 1990, Appellee filed its Response to Application for Stay of Proceedings objecting to a stay. Appellee contends Appellants were repeatedly granted continuances in the trial court on the same grounds presented here; that William Choate's service did not and does not now, materially affect his ability in this case, and that the application for stay is being used for the purpose of delay.

On December 11, 1990, Appellants filed their Appellants' Response to Order of 27 NOV 90, stating the military orders and certification of duty were to be forwarded by separate letter to the Court. On or about December 12, 1990, this Court received a letter from Appellant William Choate, with attached copies of his military orders. In the letter, Appellant notes he will not provide this Court with the affidavit of his military commander. Appellant first argues that it would be impractical because of distance and time to do so. He further contends that because it is the statutory duty of the Court to opine whether he is materially affected by his military service, it would be improper for the Court to consider the "opinions" of either the military commander or Appellee.

William Choate's military orders reveal that he has been ordered to temporary active duty at Carswell Air Force Base, Texas, for the period December 10 - December 21, 1990, and that he served at Grissom Air Force Base, Indiana, from November 5 - December 6, 1990. The orders further reveal he serves as a voluntary individual augmentee assisting in the provision of various legal services at the base level.

In view of Appellants' decision not to comply with the order to provide the verifying affidavit, the only support for Appellants' application, is the military orders and William Choate's conclusional assertions.

The Soldiers' and Sailors' Civil Relief Act is not construed to require a stay of proceedings on the mere showing that a service member is on active duty, even at a location away from his or her residence. *Boone v. Lightner*, 319 U.S. 561, 63 S.Ct. 1223, 87 L.Ed.1587; *Huckaby et al v. Oklahoma Office Building Co.*, 201 Okla. 141, 202 P.2d 996 (1949). In some cases, the duty location and military circumstances may create a presumption that ability to prosecute or defend an action is materially affected, but that is not the case here. A stay is not a matter of right, but is within the discretion of the Court. This "discretion" includes the discretion as to whom or what the Court may ask to be presented in order to make a fair judgment. *Boone v. Lightner*, at p. 1229.

Although William Choate is acting pro se, in the absence of the requested verification by his military commander, we are not convinced his military service in Texas will materially affect Appellants' ability to meet the filing schedule as modified by this Court's extension. We do not intend to denigrate either his service, or the contribution William Choate may be making to

the resolution of legal problems at the military base level. However, we discern nothing to lead us to conclude that his presence at the place of temporary duty is of such vital interest to national security that he could not be spared sufficient time to prepare a petition for rehearing, if he chooses to do so. We also find he could have provided the ordered affidavit verifying his service, and that this Court's directing production of the affidavit was proper.

Appellants' Application for Stay of Proceedings is therefore DENIED.

This determination precludes the necessity for further response by Appellee to the application for stay.

DONE BY ORDER OP THE COURT OF APPEALS this 20th day of December, 1990.

s/_____
CAROL M. HANSEN, JUDGE

HUNTER, V.C.J. and
GARRETT, P.J. concur

RELEASE FOR PUBLICATION IN THE
OKLAHOMA BAR JOURNAL
BY ORDER OF THE COURT OF APPEALS

DIVISION 3

January 24, 1991

Filed
Court of Appeals
State of Oklahoma
January 28, 1991
James W. Patterson
Clerk

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

* * *

69,777 - Cons. w/70,205 & 73,343. The Federal Land Bank of Wichita, Appellee v. William W. Choate,

* * *

Appellants' Petition for Rehearing and Application for Extension of Time to File Petition for Rehearing on Appellants' Application for Stay are DENIED.

* * *

DONE BY ORDER OF THE COURT OF APPEALS IN CONFERENCE this 24th day of January, 1991.

s/ _____
JAMES P. GARRETT, Presiding Judge

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Tuesday, May 21, 1991

Filed
Supreme Court
State of Oklahoma
May 21, 1991
James W. Patterson
Clerk

THE CLERK IS DIRECTED TO ISSUE
THE FOLLOWING ORDERS:

* * *

69,777 (consolidated with 70,205, 73,343) The Federal Land Bank of Wichita v. William W. Choate, Edna B. Choate et al. Certiorari denied. All justices concur.

* * *

s/
CHIEF JUDGE

IN THE DISTRICT COURT OF SEMINOLE COUNTY

STATE OF OKLAHOMA

THE FEDERAL LAND BANK OF WICHITA, Plaintiff	]	No. C-86-377 Filed Seminole County
vs.	]	January 12, 1987
	]	Patricia Gaines
WILLIAM W. CHOATE, et al Defendants	]	Court Clerk

MOTION TO BRING IN THIRD-PARTY DEFENDANT

Defendant William W. Choate moves for leave, as Third-Party Plaintiff for himself and all other members of a class, being Oklahoma Military Veteran Farmers, similarly situated, to cause to be served upon Thomas K. Turnage, Administrator of the Veterans Administration, a Summons and Third-Party Petition, copies of which are hereto attached as "Exhibit X".

By: s/_____
William W. Choate (OBA 1667)

* * *

THIRD-PARTY PETITION

COMES NOW Defendant William W. Choate, above named, for himself and all other members of a Class defined hereafter, and alleges and states to the Court as follows:

1. That the Class to which this Petition applies consists of those residents and real property owners of the State of Oklahoma who are Veterans of the Military Services of the United States of American an are eligible by reason of their vocation in agriculture for the automatic loan guaranty benefit provided in Title 38 of the United States Code, Paragraph 1810 (a) (5), to wit: automatic loan guaranty to refinance indebtedness.

2. That the class is so numerous that joinder of all members is impracticable; that there are questions of law or fact common to the class; that the claims or defenses of the representative party are typical of the claims or defenses of the class; and that the representative party will fairly and adequately protect the interests of the class.

3. That the prosecution of separate actions by or against individual members of the class would create the risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

4. That the Plaintiff has filed against the Defendants its

Petition, a copy of which is hereto attached as Exhibit "A", alleging default in the payment of a certain Promissory Note dated October 12, 1978 and seeking to foreclose purported interests and claims upon a Mortgage described therein.

5. That pursuant to Title 38 of the U.S. Code, Sections 1809 et seq. the Third-Party Defendant Administration is required by law to make available certain loan guaranty entitlements to military veterans in an "automatic" processing procedure by which loan closing is to precede the reporting for guaranty.

6. That the Third Party Defendant Administration has been negligent in the performance of the said duty in that it has denied the said entitlement to members of the Third-Party Plaintiff Class in whole or in part by the combination of undue delays in processing applications through lenders, dissemination of misinformation, disorderly and unwarranted inducement and enforcement of expensive and time consuming requirements pertaining to proposed collateral, and inadequate instructions to lenders, all in bad faith.

7. That, further, the said entitlement has been denied members of this Class in whole or in part under color of local credit standards by the Third-Party Defendant Administration through its uneven, arbitrary, inconsistent, capricious, abusive, and unlawful interpretations or applications of its authority and duty.

8. That as First Cause of Action against the Third Party Defendant, the Third Party Plaintiffs have incurred excessive, unwarranted alternative financing, repossession, replevin, and foreclosure upon equipment, land, facilities, livestock, and other collateral, and have sustained losses pertaining thereto

which would have been avoided by timely and adequately administration of the said entitlement, for which losses they should be compensated.

9. That as Second Cause of Action against the Third Party Defendant, the Third Party Plaintiffs claims their redress for deprivation of their said rights pursuant to Title 42, Section 1983 of the U.S. Code.

10. That as Third Cause of Action against the Third Party Defendant, alleges, subject to discovery, acts of conflicts of interest, conspiracy to exercise detrimental influence on the fair market value of land, equipment and livestock by and among employees of the Third-Party Defendant, for which acts disciplinary damages should be awarded and the Third-Party Plaintiffs compensated accordingly.

11. That as Fourth Cause of Action the Third-Party Plaintiffs allege they are entitled to certain rights of redemption or restitution which would be further lost by continued denial of the said entitlement, and state they are entitled to orders enjoining the Third Party Defendant Administration from further denial of the said automatic loan guaranty.

WHEREFORE, William W. Choate, for himself and all other members of the said class, being residents and real property owners of the State of Oklahoma and Veterans of the Military Services of the United States of American engaged in agriculture, hereby demands judgment against the Third-Party Defendant Thomas K. Turange, Administrator of the Veterans Administration for the injunctive relief above described and for all sums that may be adjudged against Defendant William W. Choate in favor of Plaintiff The Federal Land Bank of Wichita, and for all other damages and sums as the Court Shall deem

proper, and for the costs of prosecution hereof.

By: s./_____

WILLIAM W. CHOATE for himself
and all other members of a class,
being Oklahoma Military Veteran
Farmers, similarly situated,
Third-Party Plaintiffs.

IN THE DISTRICT COURT OF SEMINOLE COUNTY,
WEWOKA DIVISION, STATE OF OKLAHOMA

THE FEDERAL LAND BANK OF WICHITA, Plaintiff,	]	No. C-86-377
vs.	]	FILED April 23, 1987 Seminole County Patricia Gaines Court Clerk
WILLIAM W. CHOATE, et al., Defendants.	]	

APPLICATION FOR NEW TRIAL

COME NOW Defendants William W. Choate, John I. M. Choate, and Edna Beth Choate, pursuant to 12 O.S. 651 et seq., and make application to the Court for a new trial in reexamination of the issues of fact and law of the jury verdict entered as a judgment on April 13, 1987. In support thereof Defendants allege the following grounds:

1. Irregularity in the proceedings by the Court, jury, and the prevailing party and abuse of discretion by which the Defendants were prevented from having a fair trial.

2. Misconduct of the Plaintiff and its witnesses.

3. Surprise, which ordinary prudence could not have guarded against.

4. Excessive damages, appearing to have been given under the influence of passion or prejudice.

5. Error in the assessment of the amount of recovery, being grossly in excessive of that amount provided by performance of the contract at issue.

6. The said verdict is not sustained by sufficient evidence and is contrary to law.

7. Newly-discovered evidence, material which the Defendants could not with reasonable diligence discover and produce at trial heretofore.

8. Errors of law occurring at the trial which were excepted to by the Defendants. all of which materially affected Defendants' substantial rights at said trial.

WHEREFORE, premises considered, Defendants pray that they be granted a new trial.

By: s/_____
WILLIAM W. CHOATE
Attorneys for Defendants

William W. Choate
John I. M. Choate, and
Edna B. Choate

IN THE DISTRICT COURT IN AND FOR SEMINOLE COUNTY

STATE OF OKLAHOMA

THE FEDERAL LAND BANK OF WICHITA,	)	No. C-86-377
Plaintiff,	)	Filed vs.
	)	Seminole County
	)	December 14, 1987
WILLIAM W. CHOATE, et al.	)	Patricia Gaines
	)	Court Clerk
Defendants.	)	

JOURNAL ENTRY OF JUDGMENT

On the 6th day of April, 1987, this cause came on for trial pursuant to regular jury docket setting, the plaintiff appeared by and through its attorney, Stanley Huser, Jr., and the defendants, William W. Choate and Edna B. Choate, appeared in person and the defendants, John I.M. Choate and Gretchen L. Choate appeared not, neither in person nor by counsel, was wholly made default, and this cause came on for trial in its regular order before a jury of twelve (12) men and women, who being duly empaneled and sworn, well and truly to try the issues joined between plaintiff and defendant and a true verdict render according to the evIdence; and having heard the evidence, the charges of the court and the argument of counsel upon their oath say,

"We, the jury, empaneled and sworn in the above entitled cause, do upon our oaths find for the plaintiff and

against the defendant and award judgment to the plaintiff in the amount of $91,867.51. Signed Shirley A. Marker, Billy W. Parks, Cletus Ledbetter, Lilly L. Morgan, Eldridge B. Qualls, Rosemarie Laffoon, N. Sue Johnson, Jamie Cupp, Natalie Yerby. This the 7th day of April, 1987, signed Cletus Ledbetter/ Foreman."

WHEREUPON this cause was continued for further proceedings herein on plaintiff's petition for foreclosure of mortgage, the plaintiff appearing by and through its attorney, Stanley Huser, Jr., and the State of Oklahoma ex rel., Robert H. Henry, Attorney General of the State of Oklahoma, by Kathlyn A. Rhodes, Assistant Attorney General, intervenor, and the defendants, William W. Choate, appearing in person and as representative of the defendants, Edna B. Choate, John I.M. Choate, and Gretchen L. Choate.

On this 28th day of September, 1987, this cause comes on for further hearing upon the petition for foreclosure of mortgage of the plaintiff herein and upon various motions, whereupon the court finds that there is due from the defendants, William W. Choate and John I.M. Choate, to the plaintiff, the sum of $91,867.51 together with interest on the sum of $80,694.09 at the rate of 14.50 percent per annum from the 6th day of November, 1986, until the next interest rate change or until paid, an attorney's fee of $10,000.00 and the costs of this action.

The court further finds that the plaintiff has a first and prior lien upon a portion of the real estate and premises described in plaintiff's petition by virtue of said mortgage as security for the payment of said indebtedness, including interest, attorney's fee, and costs, said property being situate in Seminole County, State of Oklahoma, and described as follows, to-wit:

The Northwest Quarter of the Southwest Quarter (NW, SW,) of the Southwest Quarter of the Northwest Quarter (SW, NW,) and the South Half of the Southwest Quarter (S+ SW,) and the Southwest Quarter of the Southeast Quarter (SW, SE,) and the North Half of the Northwest Quarter (N+ NW,) of Section Thirty-four (34), Township Nine (9) North, Range Five (5) East, LESS AND EXCEPT all interest in and to the oil gas and other minerals therein and thereunder,

and that said mortgage provides that the mortgagors waive the benefit of all stay, valuation, homestead and appraisement laws and that said real estate should be sold without appraisement.

The court further finds that said defendants, William W. Choate and Edna B. Choate, are also claiming an additional right, title or interest in and to said above described real property by virtue of a right-of-wayagreement dated October 28, 1986, recorded in Book 1561 at page 136 of the records of Seminole County, Oklahoma, for a roadway or pipeline, a telegraph or telephone line, a water pipeline, a sewer line or other utilities, but that any right, title or interest said defendants have in or to said real property by virtue thereof are junior and inferior to the rights and claims of the plaintiff.

The court further finds that the defendant, United States of America, by Roger Hilfiger, United States Attorney for the Eastern District of Oklahoma, through Ralph F. Keen, Assistant United States Attorney, on behalf of the Internal Revenue Service, United States Department of Treasury, has filed herein its disclaimer disclaiming any right, title, or interest, estate or lien in or to the real property hereinabove described and

in or to the real property involved in this action, which said disclaimer the court examines and approves.

The court further finds that Title 62 O.S.SUPP. 1986, Sections 492 and 493, more commonly known as the "Moratorium Act" is unconstitutional and has no bearing on these proceedings and that the exercise of the right of the State of Oklahoma, ex rel., Robert H. Henry, Attorney General of the State of Oklahoma, should be and the same is hereby overruled.

The court further finds that the motion of the State of Oklahoma, ex rel., Robert H. Henry, Attorney General of the State of Oklahoma, intervenor, to stay further proceedings in this cause should be and the same is hereby overruled.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the court that the plaintiff do have and recover of and from the defendants, William W. Choate and John I.M. Choate, judgment in the sum of $91,867.51 together with interest on the sum of $80,694.09 at the rate of 14.50 percent per annum from the 6th day of November, 1986, until the next interest rate change or until paid, an attorney's fee of $10,000.00 and the costs of this action and that such amounts constitute a first and prior lien upon the real estate and premises hereinabove described and that any right, title, and interest which the defendants, William W. Choate, Edna B. Choate, John I.M. Choate and Gretchen L. Choate, and each of them, in this cause have or claim to have in and to said real estate is junior and inferior to the mortgage and lien of the plaintiff.

And it further appearing to the court that said mortgage of the plaintiff, The Federal Land Bank of Wichita, contains a provision that the mortgagors waive the benefit of all stay, valuation, homestead and appraisement laws, it is further or-

dered and adjudged by the court that in case the said defendants, William W. Choate and John I.M.Choate, fail for six (6) months from the date of the entry of this judgment to satisfy said judgment, interest, attorney's fees and costs, an order of sale shall issue to the Sheriff of said County of Seminole, State of Oklahoma, commanding him to advertise and sell according to law, without appraisement, the lands and tenaments (sic) described in the mortgage of said plaintiff, situate in Seminole County, State of Oklahoma, to-wit:

> The Northwest Quarter of the Southwest Quarter (NW, SW,) and the Southwest Quarter of the Northwest Quarter (SW, NW,) and the South Half of the Southwest Quarter (S+ SW,) and the Southwest Quarter of the Southeast Quarter (SW, SE,) and the North Half of the Northwest Quarter (N+ NW,) of Section Thirty-four (34), Township Nine (9) North, Range Five (5) East, LESS AND EXCEPT all interest in and to the oil, gas and other minerals therein and thereunder,

and to apply the proceeds arising from said sale as follows:

(1) In payment of the costs of said sale and of this action.

(2) In payment to plaintiff, The Federal Land Bank of Wichita, the sum of $91,867.51 together with interest on the sum of $80,694.09 at the rate of 14.50 percent per annum from the 6th day of November, 1986, until the next interest rate change or until paid, an attorney's fee of $10,000.00 and the costs of this action.

(3) That the residue, if any, be paid to the Clerk of this

Court to await the further order of this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the court that from and after the sale of said real property under and by virtue of this judgment and decree said defendants, William W. Choate, Edna B. Choate, John I.M.Choate and Gretchen L. Choate, and each of them, and all persons claiming under them or either of them since the filing of the petition herein, be and they are forever barred and foreclosed of and from any and every lien upon, right, title, interest, estate or equity of, in or to said real estate or any part thereof adverse to the prucahser at said sale.

s/_____
Gordon R. Melson
Judge of the District Court

IN THE DISTRICT COURT OF THE TWENTY-SECOND JUDICIAL DISTRICT SITTING IN SEMINOLE COUNTY

THE FEDERAL LAND BANK OF WICHITA, Wichita, Kansas, a corporation, Plaintiff,	)	
vs.	)	Dist. Court No. C-86-377
WILLIAM W. CHOATE, et al.	)	Supreme Court No.69,777
Filed Defendants,	)	
	)	Seminole County
	)	May 17, 1988
and	)	Patricia Gaines
	)	Court Clerk
STATE OF OKLAHOMA ex rel. ROBERT H. HENRY, Attorney General, Intervenor.	)	

INTERVENOR'S MOTION TO APPRISE COURT OF RULING BY SUPREME COURT ON CONSTITUTIONALITY OF MORTGAGE FORCLOSURE MORATORIUM ACT, AND MOTION TO DROP INTERVENOR AS PARTY

Intervenor, State of Oklahoma ex rel. Robert H. Henry, Attorney General, respectfully moves to apprise the Court of a

ruling by the Supreme Court on May 3, 1988 concerning the constitutionality of 12 O.S. Supp. 1987, 462-463, the Mortgage Foreclosure Moratorium Act (the "Moratorium Act"), and further moves the Court to drop the State as a party to this lawsuit. In support of these Motions, the State would show the Court the following:

(1) The State of Oklahoma ex rel. Robert H. Henry, Attorney General, intervened in the present lawsuit in order to offer evidence and argument in support of the propriety of the Moratorium Act, which was in effect for one year, and which prevented Plaintiff herein, the Federal Land Bank of Wichita, from foreclosing against its borrowers, primarily farmers such as Defendants herein.

(2) Plaintiff filed this foreclosure action during the moratorium period.

(3) This Court ruled by Journal Entry of Judgment, filed herein on December 14, 1987, that the Moratorium Act is unconstitutional.

(4) On May 3, 1988, the Supreme Court of Oklahoma ruled on the constitutionality of the Moratorium Act in Appeal No. 68077, styled *Fed. Land Bank of Wichita, Wichita, KS, a corporation, Appellee, v. Jim Story et al., Appellants, and State of Oklahoma, ex rel. Robert H. Henry, Attorney General, Intervenor-Appellant*, 59 O.B.J. 1212, (May 3, 1988) affirming the Order of the District Court of Craig County that the Moratorium Act is unconstitutional. (Copies of both the major opinion and the dissent are attached as Exhibit "A" hereto, for the Court's convenience.)

(5) Specifically, the Supreme Court of Oklahoma held

that the Moratorium Act is "unconstitutional on its face" because it violates the Contracts clause of the Federal and Oklahoma Constitutions and "fails to provide a speedy and certain remedy for every wrong and injury without delay," in violation of Art. II, 6 of the Oklahoma Constitution.

(6) The only issue in this lawsuit in which the State had any interest has now been finally adjudicated, and there remains no reason for the State to continue to be a party to this lawsuit.

WHEREFORE, Intervenor, State of Oklahoma, ex rel. Robert H. Henry, Attorney General, respectfully requests the Court to be apprised of the Supreme Court's ruling that the Moratorium Act is unconstitutional and further requests the Court to allow the State to withdraw as a intervening party in this lawsuit.

Respectfully submitted,

s/_____
ROBERT H. HENRY
ATTORNEY GENERAL OF OKLAHOMA

KATHLYN A. RHODES
ASSISTANT ATTORNEY GENERAL
112 State Capitol Building
Oklahoma City, OK 73105
(405) 521-3921

ATTORNEYS FOR INTERVENOR,
STATE OF OKLAHOMA

IN THE COURT OF APPEALS OF
THE STATE OF OKLAHOMA
Division III

THE FEDERAL LAND BANK OF WICHITA,	]	
Appellee,	]	
versus	]	
WILLIAM W. CHOATE, EDNA B. CHOATE, JOHN I.M. CHOATE and GRETHEN L. CHOATE,	]	
Appellants,	]	Case No. 69,777
and,	]	
JOHNNY E. JOHNSON, CAROL E. JOHNSON, FIRST NATIONAL BANK OF SEMINOLE, FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF SEMINOLE and THE UNITED STATES OF AMERICA, ex rel INTERNAL REVENUE SERVICE,	]	Filed Court Of Appeals State of Oklahoma November 26, 1990 James W. Patterson Clerk
and,	]	

	]
STATE OF OKLAHOMA,	]
ex rel ROBERT H.	]
HENRY, ATTORNEY	]
GENERAL OF OKLAHOMA,	]
	]
Intervenor.	]

APPLICATION FOR STAY OF
PROCEEDINGS WITH AUTHORITIES

Comes now the Appellant, William W. Choate, pursuant to 20 O.S. 30.1, Rule 3.9 of The Court of Appeals, and 50 App.U.S.C. 521, and shows as follows:

1. That on November 13, 1990 This Court filed a Memorandum Opinion dismissing in part, and affirming in part the District Court decision from which, this appeal was taken, review of which and extension of time in which to petition for rehearing is allowed by Rule 3.9 of this Court.

2. That the said Appellant is currently in the active military service and has been ordered to duty at locations which make it prohibitive for him to have timely access to the complete Record, applicable references, time, and other resources necessary to invoke the Rules which allow review of this decision by this Court and the Supreme Court of the State of Oklahoma.

3. That 50 App. U.S.C. 521 provides as follows:

> *At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter* may, in the discre-

tion of the court in which it is pending, on its own motion, and *shall, on application to it by such person or* some person in his behalf, *be stayed* as provided in this Act [sections 501 to 591 of this Appendix], unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service. (emphasis added)

WHEREFORE, premises considered and time being of the essence in the matter, Appellant hereby makes the Application as provided for an Order of this Court staying further actions or proceedings in this case until after his said military service is terminated.

s_____

William W. Choate,
Appellant (OBA 1667)
P. O. Box 65
Seminole, OK 74818
(405) 382-5345

AFFIDAVIT

County of Miami]
]
ss. State of Indiana]

The undersigned Affiant, being first duly sworn, deposes and states as follows:

1. That he is Appellant in the captioned proceeding, of lawful age, and otherwise competent to make this Affidavit.

2. That he is presently and will be for the foreseeable future on continual active military duty.

3. That by reason of said duty and the nature of the current national military crisis, the locations of his assignment are controlled by changing priorities, are uncertain, and typically in such mobility do not permit in a feasible manner procuring and transporting with him the files in the captioned matter necessary to use in briefing support for petition for rehearing.

4. That all of his assignments since onset of the said crisis and for the foreseeable future are at locations where access to libraries having necessary authorities for his briefing are not available. Further, Affiant saieth not.

DATED this 20th day of November 1990 at Grissom Air Force Base, Indiana.

s/_____
William W. Choate, Affiant

THE COURT OF APPEALS OF
THE STATE OF OKLAHOMA
Division III

THE FEDERAL LAND BANK OF WICHITA	)	
Appellee,	)	Case Number 69,777
versus	)	
	)	Filed Court of Appeals
WILLIAM W. CHOATE, EDNA CHOATE, JOHN I.M. CHOATE AND GRETCHEN L. CHOATE	)	State of Oklahoma B. November 27, 1990 James W. Patterson Clerk
Appellants.	)	

ORDER

In consideration of Appellants' Application for Stay of Proceedings with Authorities, they are granted a twenty day extension within which to file a petition for rehearing. Upon compliance with the following ORDERS, this Court will further consider Appellants' application.

Appellants are ORDERED to provide to this Court and Appellee, within ten days of filing of this order, a copy of the military orders directing William W. Choate to report for active duty, and an affidavit from his commanding officer verifying

that his ability to prosecute this action is materially affected by reason of his military service.

Appellee is ORDERED to respond to Appellants' application within ten days of receipt of the copy of the military orders and affidavit.

DONE BY ORDER OF THE COURT OF APPEALS this 26th day of November, 1990.

s/_____
CAROL M. HANSEN, JUDGE

THE COURT OF APPEALS OF
THE STATE OF OKLAHOMA
Division III

THE FEDERAL LAND BANK OF OF WICHITA,	]	
Appellee,	]	Case Number 69,777
	]	Filed
	]	
	]	Court of Appeals
versus	]	State of Oklahoma
	]	December 11, 1990
WILLIAM W. CHOATE, et al.	]	James W. Patterson
	]	Clerk
Appellants.	]	

APPELLANTS' RESPONSE TO ORDER OF 27 NOV 90

Come now the Appellants, pursuant to Order of this Court filed on 27 Nov 1990 in regard to the Application of the Appellants for Stay of Proceedings, and hereby state as follows:

1. Said Order allowed ten days for response; due to forwarding delay, receipt by the undersigned was after hours on 6 Dec 9O, so that posting of this response could not be accomplished until 7 Dec 9O.

2. The requested military orders and certification of duty are submitted by separate letter to the Court in the nature of a bill of particulars for the reasons stated therein.

3. Neither such Affidavit alluded to in said Order nor copies of the orders are provided to the Appellee for the reasons stated in the separate letter to the Court, and because 50 App. U.S.C. 521 provides that the Stay shall be

> granted unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service. (emphasis added)

Thus, there is no provision for either verification by the commanding officer or objection by the adverse party, neither of whom is necessarily in position to adjudicate the personal ability of the service member as to his case.

Premises considered, Appellants respectfully request entry of the Stay of Proceedings pursuant to the Application dated 20 Nov 1990.

s/_____
William W. Choate (OBA 1667)
Appellant Pro Se'
P. O. Box 65
Seminole, OK 74818

* * *

LISTING PURSUANT TO COURT RULE 29.1

Respondent, The Farm Credit Bank of Wichita ("FCB"), is a Federally chartered instrumentality of the United States and a successor to The Federal Land Bank of Wichita ("FLB"). FCB was established pursuant to 12 U.S.C.A. 2001(a) (West 1989) through the merger of FLB and The Federal Intermediate Credit Bank of Wichita. FCB is a part of the Farm Credit System and provides loans to borrowers in the Ninth Farm Credit District, which includes Oklahoma, Kansas, Colorado and New Mexico. FCB has no parent company or non-wholly owned subsidiaries.

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Case No. 91-548
IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

WILLIAM WESLEY CHOATE,
Petitioner,

vs.

THE FEDERAL LAND BANKOF WICHITA,
N/K/A THE FARM CREDIT BANK OF WICHITA,
Respondent.

BRIEF OF RESPONDENT, THE FARM CREDIT BANK OF WICHITA, IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent, The Farm Credit Bank of Wichita ("FCB") respectfully requests that this Court deny the Petition for Writ of Certiorari (the "Petition") of the petitioner, William Wesley Choate ("Choate"). The Petition seeks review of the following two orders of the Court of Appeals, State of Oklahoma (the "Court of Appeals");

1) Memorandum Opinion entered November 13, 1990, affirming FCB's judgment against Choate for the amounts due under a promissory note and foreclosure of a mortgage securing repayment of the Note; and

2) Order entered December 20, 1990, denying an application to stay the appeal proceedings (the "Stay Order").

JURISDICTION

In the Petition, Choate requests this Court to review the Memorandum Opinion and the Stay Order. While Choate relies upon 28 U.S.C.A. §1257(a) (West 1990) as the basis of this Court's jurisdiction, FCB contends that this Court does not have jurisdiction to review the Memorandum Opinion.

TEXT OF STATUTES AND REGULATIONS

Section 521 of the Soldiers' and Sailors' Civil Relief Act of 1940 (the "Relief Act"), 50 U.S.C.A App, 501 et.seq., (West 1990) provides:

> At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.

STATEMENT OF CASE

This case was commenced on November 12, 1986, when FCB filed a foreclosure petition against Choate in the District Court of Seminole County, Oklahoma (the "District Court"), seeking money judgment for the amounts owed by

Choate under a certain promissory note (the "Note") and foreclosure of the mortgage securing repayment of the Note (the "Mortgage") (the "Foreclosure Case").

After a jury verdict in favor of FCB on April 7, 1987, the District Court rendered judgment against Choate and in favor of FCB in the amount of $91,867.51 and ordered the Mortgage foreclosed (the "Judgment"), (A-22)[1]

Choate appealed the Judgment to the Oklahoma Supreme Court by filing a Petition in Error on October 28, 1987. The Court of Appeals affirmed the Judgment on November 13, 1990.

On November 26, 1990, Choate filed an "Application for Stay of Proceedings and Authorities" (the "Application for Stay") in which he requested a stay of the appeal pursuant to Section 521 of the Relief Act. The Application for Stay was denied by the Court of Appeals on December 20, 1990. (A-31)

In the Petition, Choate requests this Court to review the Memorandum Opinion and the Stay Order. While Choate's contentions are somewhat obscure, it appears that he requests this Court to review the following alleged errors:

1. Whether the Note was in default when FCB filed the Foreclosure Case (Choate had paid a portion of principal in advance in exchange for a partial release of the Mortgage, which he argues prepaid the Note);

2. Whether Choate preserved for appeal certain allega-

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[1] "A" refers to the Appendix to Brief of Respondent, The Farm Credit Bank of Wichita, in opposition to Petition for Writ of Certiorari, submitted herewith.

tions of error with respect to his attempts to join the Veterans' Administra-tion ("VA") in the Foreclosure Case;

3. Whether the District Court erred in allowing the Oklahoma Attorney General to withdraw from the Foreclosure Case;

4. Whether the District Court and Court of Appeals erred in holding that Choate did not have an easement or "right-of-way" over the Property by virtue of an "easement" granted by the Choates to themselves shortly before FCB filed the Foreclosure Case; and

5. Whether the Court of Appeals wrongfully requested Choate to submit a verification by his commanding officer that Choate's ability to pursue the appeal was adversely affected by reason of his military service.

These issues will be discussed as they relate to the Memorandum Opinion and the Stay Order.

I. The Memorandum Opinion

A. Default under the Note

On October 12, 1978, Choate and his brother, John Choate, made and delivered to FCB the Note, which was in the principal sum of $108,000.00. Shortly thereafter, Choate entered into a contract to sell a portion of the property covered by the Mortgage. Accordingly, on May 5, 1980, Choate paid $20,000.00, a portion of the proceeds of sale of FCB's collateral, to FCB in exchange for FCB's execution of a partial release of mortgage.

Upon receipt of the $20,000.00 payment, FCB applied $198.56 to unpaid interest and the remainder to principal. Thereafter, Choate's monthly payments under the Note remained the same; however, each payment served to reduce more principal than would have been reduced if not for the $20,000.00 payment. Due to the $20,000.00 principal reduction, Choate would theoretically repay the Note earlier than anticipated.

FCB's application of the $20,000.00 payment was in accordance with the terms of the Note, which provided:

> All or any part of the principal sum may be paid in advance, without penalty, at any time. Any advance payment so made may be applied entirely upon principal or the Bank, at its option, may apply a portion to interest accrued with respect to the payment and the balance of the payment upon principal. Any advance payment made shall operate to reduce the debt evidenced hereby, to sooner retire the same; and to reduce the amount of any interest-only installment; but shall not change the due date of any interest-only installment nor the amount or due date of any principal-and-interest installment, except to the extent that advance payment results in elimination or reduction of the final installment or installments provided herein.

After making the $20,000 payment, Choate continued to make erratic payments under the Note for an additional five years until June of 1985, when he ceased making payments entirely. When FCB filed the petition to commence the Foreclosure Case on November 12, 1986, Choate owed principal and accrued, unpaid interest totalling $91,867.51.

Choate claims that FCB unlawfully charged him a prepayment "penalty" when he made the $20,000.00 payment and that FCB should have held the $20,000.00 and applied it to the monthly payments due under the Note. There is simply no contractual or legal authority for these propositions.

Both the District Court and the Court of Appeals found that Choate had defaulted under the Note, that the outstanding indebtedness had been accelerated pursuant to the terms thereof and that FCB was entitled to the Judgment. Both courts specifically found that the language of the Note, as well as Choate's actions after the $20,000.00 payment, precluded Choate from arguing that he had "pre-paid" the Note.

B. Denial of the application to join VA as a third-party defendant

On January 12, 1987, Choate filed a "Motion to Bring in Third-Party Defendant", in which he sought leave to join the VA as a defendant in the Foreclosure Case (the "Joinder Motion"). (A-15) Attached to the Joinder Motion was a copy of the Third-Party Petition that Choate proposed to file against VA. (A-16)

In the Petition, Choate represents to this Court that he only sought to join VA for the purpose of asserting affirmative defenses in the Foreclosure Case and that he did not seek money damages against VA. Contrary to Choate's representations, the proposed Third Party Petition shows that Choate desired to allege a class action lawsuit seeking damages from VA for (i) wrongful denial of the "automatic loan guaranty to refinance indebtedness"; (ii) deprivation of civil rights pursuant to 42 U.S.C. 1983; and (iii) "conspiracy to exercise detrimental influence on the fair market value of land." (A-16).

The District Court denied the Joinder Motion on January 28, 1987. [2]

After Judgment was rendered against Choate in the Foreclosure Case, Choate filed an Application for New Trial and supporting Affidavit on April 23, 1987. (A-20) Neither the Affidavit nor the Application for New Trial challenged the trial court's denial of the Joinder Motion. Because Choate had not challenged the District Court's denial of the Joinder Motion in the Application for New Trial as required by Oklahoma law, the Court of Appeals refused to consider the issue on appeal. (A-6)[3]

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[2] The denial of the Joinder Motion did not prevent Choate from asserting his alleged claims against VA and FCB in another forum. On November 6, 1987, Choate filed a class-action Complaint against VA and FCB in the United States District Court for the Western District of Oklahoma, Case No. CIV-87-2234-R (the "Choate Federal Case"). In the Complaint, Choate sought an order (i) requiring VA to stop withholding "his automatic home loan guarantee"; (ii) declaring the discretionary powers granted to VA to determine "satisfactory credit risks" unconstitutional; and (iii) awarding compensatory and punitive damages to Choate and other members in the proposed class of plaintiffs. The Choate Federal Case was dismissed on June 13, 1988, after Choate failed to amend his complaint. Choate has never appealed the dismissal of the Choate Federal Case, nor has he attempted to refile his claims against FCB and VA.

[3] The Court of Appeals specifically stated:

> As the third proposition, Choate contends the trial court erred in overruling a motion to make the administrator of the Veterans' Administration a third party defendant. Without discussing the substance of the motion, we find that Choates failed to preserve this alleged error for appeal by not including it in their timely motion for new trial. Appellants may not raise allegations of error (continued)

C. Allowing the Oklahoma Attorney General to withdraw from the Foreclosure Case

In 1986, the Oklahoma Legislature passed the Oklahoma Mortgage Foreclosure Moratorium Act, Okla. Stat. tit. 62 492-493 (West Supp. 1986) (the "Moratorium Act"). Section 492 of the Moratorium Act prohibited the Federal Land Bank of Wichita and any Federal Land Bank Association from initiating a foreclosure action in any Oklahoma court for a period of one (1) year. The Moratorium Act was due to expire by its terms on May 21, 1987.

FCB filed the Foreclosure Case against Choate on November 12, 1986. After the trial, on April 24, 1987, the Attorney General for the State of Oklahoma filed an "Exercise of Attorney General's Right to Intervene to Defend Constitutionality of Statute" and a Memorandum Brief in Support of the Constitutionality of the Moratorium Act.

Pursuant to Section 2024 of the Oklahoma Pleading Code, Okla. Stat. tit. 12, 2001 *et seq.*[4], the District Court allowed such intervention as a matter of right and the parties to the Choate Foreclosure briefed the constitutionality of the Moratorium Act. After reviewing the briefs filed by the parties, the District Court ruled the Moratorium Act unconstitutional. (A-25)

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[3] (continued)

which were available on filing a motion for new trial, but which were not asserted. (Citations omitted.) (A-1)

[4] Section 2024(i) provides that the Oklahoma Attorney General has the right to intervene in any action in which the constitutionality of any Oklahoma State statute is challenged.

On May 3, 1988, in *Federal Land Bank v. Story*, 756 P.2d 588 (Okla. 1988), the Oklahoma Supreme Court declared the Moratorium Act unconstitutional. After the Oklahoma Supreme Court's decision in *Federal Land Bank v. Story*, the Oklahoma Attorney General filed a notice in the Foreclosure Case, apprising the District Court of the decision by the Oklahoma Supreme Court and seeking to withdraw as a party to the Foreclosure Case. (A-28)

While Choate does not take issue with the Oklahoma Supreme Court's decision in *Federal Land Bank v. Story*, he has alleged two separate theories with respect to the issue of intervention by the Oklahoma Attorney General. First, in the Petition in Error filed in the Oklahoma Supreme Court on October 28, 1987, Choate claimed that the District Court "erred in disallowing intervention of the Attorney General of the State of Oklahoma to defend constitutionality of State Law." Similarly, in the Appellant's Brief in Support of Petition in Error filed in the Oklahoma Supreme Court on December 19, 1988, Choate argued that the District Court erred when it did not allow intervention by the Attorney General to impose the Moratorium Act, even though he acknowledged the unconstitutionality of the Moratorium Act.

When the Court of Appeals addressed this issue, it found that Choate's allegations of error were without merit because the District Court actually allowed the Oklahoma Attorney General to intervene. (A-1) Moreover, the Oklahoma Attorney General voluntarily withdrew from the Foreclosure Case after the decision of the Oklahoma Supreme Court in *Federal Land Bank v. Story, supra.* (A-28)

Finally, in the Petition for Writ of Certiorari filed in the Oklahoma Supreme Court and in the Petition filed in this Court, Choate claims that in spite of the unconstitutionality of the Moratorium Act, the Oklahoma Attorney General should not have been allowed to withdraw from the Foreclosure Case because he was trying to seek alternative financing from the "Capital Corporation"[5] to pay off the Note. Choate claims the Oklahoma Attorney General "neglected or did not understand the role of the Capital Corporation in acquiescing to withdrawal on a basis of unconstitutional interference with contract." (Petition, p.18) Choate's arguments simply do not make sense because the Capital Corporation was specifically allowed to pursue foreclosure proceedings in Oklahoma courts. Moreover, the Capital Corporation was created to assist financially troubled farm credit entities, not financially troubled borrowers of farm credit entities.

After the decision of the Oklahoma Supreme Court in *Federal Land Bank v. Story*, the Oklahoma Attorney General simply had no reason to remain a party in the Foreclosure Case. The Attorney General could not seek a stay of the Foreclosure

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[5] Pursuant to Section 492 of the Moratorium Act, the "Capital Corporation" was not prohibited from initiating foreclosure actions after a determination that a borrowed loan was not eligible for restructuring assistance. As defined in the Moratorium Act, Capital Corporation means Federal Credit System Corporation as defined in the Farm Credit Amendments Act of 1985, PL 99-205. The Capital Corporation, established pursuant to the Capital Corporation Act of 1985, 99-205, was created to provide financial and technical assistance to institutions within the Farm Credit System. As part of this function, the Capital Corporation was authorized to acquire non-performing assets of the member institutions.

Case based upon an unconstitutional statute, nor could it require the Capital Corporation to acquire Choate's loan from FCB. In any event, Choate did not raise the issue in this context until after the decision of the Court of Appeals in the Memorandum Opinion. Accordingly, this issue was not addressed by either the Oklahoma Supreme Court or the Court of Appeals.

D. The Easement or Right of Way

Choate also questions the propriety of the District Court's finding that Choate did not have a prescriptive easement over the Property which would have given him access to his "homestead property." Choate claims entitlement to the easement over the Property by reason of the recording of a document purporting to grant an easement to himself. This document was filed shortly before the Foreclosure Case was commenced.

While Choate claimed continual, exclusive, open and hostile use of this "right-of-way" since 1971, such use was over his *own* property. According to Oklahoma law, an easement by prescription may be gained only by adverse, not by permissive use. *See Zimmerman v. Newport*, 416 P.2d 622 (Okla. 1966). Thus, the Court of Appeals found that the District Court did not err in finding that any right, title or interest the Choates may have to the "right-of-way" was junior or inferior to the rights of FCB.

E. Miscellaneous Issues

In the Memorandum Opinion, the Court of Appeals also disregarded certain other issues raised by Choate because of Choate's failure to abide by certain procedural requirements. First, the Court of Appeals declined to address any of the allegations of error submitted by Choate in his Supplemental Brief filed to support three Amended Petitions in Error because

none of the Amended Petitions contained any allegation of error which would render any additional issue set forth in the Supplemental Brief reviewable. Additionally, the Amended Petitions were filed without leave of court, as required by applicable court rules. [6]

Finally, the Court of Appeals refused to consider a "trust" theory raised by Choate in the appeal because Choate was apparently switching theories and was trying to raise this theory for the first time on appeal. At trial, Choate's "trust" theory related to the "constructive trust" allegedly created by the $20,000.00 payment made by Choate in 1980. On appeal, Choate's trust theory was stated in terms of FCB's alleged violation of "trust" by pledging the Note and Mortgage as collateral for bonds issued with "no-call" provisions. Because this was clearly a new theory, the Court of Appeals declined to address this argument. (A-7)

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[6] Specifically, the Court of Appeals states:

> The three "Amended Petitions in Error, and Appellant's Supplemental Brief pertain to trial court post-judgement determinations on a variety of motions. All three Amended Petitions were filed subsequent to completion of briefing by both parties without leave of court, in violation of rule 1.17, Rules of Appellate Procedure in Civil Cases, 12 O.S. 1981 Chap. 15 App. 2. Further, none of these Petitions contains *any* allegations of error. It is a longstanding and well established rule that Oklahoma Appellate Courts will not consider errors argued in briefs which are not presented by Petition in Error. (Citations omitted) Accordingly, we decline review of the errors alleged in Appellant's supplemental brief. (A. 3-4)

II. The Stay Order

Choate claims the Court of Appeals erred when it refused to grant a stay of proceedings pursuant to Section 521 of the Relief Act ("Section 521"). He contends that the Stay Order was based on the fact that he was a "volunteer" and that he should have been able to get his commander, "a layman in court matters, to execute an affidavit attesting to the adverse effects upon his ability to conduct litigation."

On November 26, 1990, Choate filed the Application for Stay (A-31) in which he requested the Court of Appeals to stay further actions or proceedings until termination of his military service. Attached to the Application for Stay was an Affidavit in which Choate stated: (i) Choate had been assigned to continuous active military duty; (ii) the locations of Choate's military assignments were changing and uncertain and did not permit him to transport the files necessary to use in briefing a petition for rehearing; and (iii) the location of his assignments did not grant him access to libraries "having necessary authorities for his briefing."

Prior to the time Choate filed the Application for Stay, he had made a habit of requesting continuances based upon his military obligations.[7] Choate is a practicing attorney, a professional engineer, a farmer and a member of the Air Force Reserves. While the Foreclosure Case and the appeal were pending, Choate was not only representing himself in all types

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[7] As reflected by the record in the Court of Appeals, Choate requested extensions of time, stays of proceedings and temporary restraining orders no less than nine (9) times during the pendency of the Oklahoma appeal process.

of litigation, but he was also representing other individuals. As reflected in the Memorandum Opinion, Choate's military service was intermittent and the times at which he served were of his own choosing.

Additionally, when Choate filed the Application for Stay, there were only two (2) additional steps in the appellate process that were possible pursuant to Oklahoma law. First, Choate would be required to file a petition for rehearing with the Court of Appeals.[8] If the Court of Appeals denied the petition for rehearing, then he could file a petition for writ of certiorari with the Oklahoma Supreme Court.[9] Oral argument is not allowed before either court unless a party files a motion specifically requesting oral argument. If a motion for oral argument is filed, it is not granted as a matter of right. See Rule 25, Rules of the Oklahoma Supreme Court, Okla. Stat. tit. 12, Ch. 15, App. 1 (1990 Supp).

In response to the Application for Stay, the Court of Appeals granted Choate a twenty (20) day extension of time within which to file a petition for rehearing. Additionally, the Court of Appeals ordered Choate to provide FCB and the Court of Appeals with the following to support the Application for Stay:

1) A copy of Choate's military orders directing him to

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[8] *See* Rule 3.9, Rules on Practice and Procedure in the Oklahoma Court of Appeals and on Certiorari to that Court, Okla. Stat. tit. 12, Ch. 15, App. 2 (Supp. 1991).

[9] *See* Rule 3.14, Rules on Practice and Procedure in the Oklahoma Court of Appeals and on Certiorari to that Court, Okla. Stat. tit. 12, Ch. 15, App. 2 (Supp. 1991)

report for active duty; and

2) An affidavit from Choate's commanding officer, verifying that Choate's ability to prosecute the Appeal was materially affected by reason of his military service. (A-35)

The Court of Appeals also ordered FCB to file a response to the Application for Stay within ten (10) days after receipt of copies of Choate's military orders and the affidavit of the commanding officer.

Choate filed a response to the Court of Appeals' Order on December 11, 1990, stating that he would not provide copies of his military orders or the affidavit to FCB because "only the opinion of the Court of Appeals was relevant to his Application." He also stated that he would not provide the affidavit of his commanding officer because "Section 521 does not provide for verification by the commanding officer or objection by an adverse party, neither of whom is necessarily in a position to adjudicate the personal ability of the service member as to his case." (A-37)

Although Choate would not submit copies of his military orders to FCB, he apparently submitted copies of his military orders to the Court of Appeals. After reviewing Choate's military orders, the Court of Appeals found Choate's evidence and arguments insufficient to grant a further stay of proceedings.

The Court of Appeals stated that Choate's military orders revealed that he had been ordered to temporary active duty at Carswell Air Force Base, Texas, for the period of December 10 through 21, 1990, and that he served at Grissom Air Force Base, Indiana, from November 5 through December 6, 1990. Choate's military orders further revealed that Choate

served as a voluntary individual augmentee "assisting in the provision of various legal services at the base level." (A-9)

The Court of Appeals also took issue with Choate's contention that it would be improper for the Court of Appeals to consider the opinions of his military commander because it is the statutory duty of the court to opine whether he is materially affected by his military service. The Court of Appeals denied the Application for Stay because, based upon the information provided and not provided by Choate, there could be no finding that his ability to prosecute the Oklahoma Appeal was materially affected by reason of his military service.

The Application for Stay having been denied, Choate completed the two remaining steps in the Oklahoma appellate process. He filed a brief and a Petition for Rehearing on December 26, 1990, which was denied by the Court of Appeals on January 28, 1991 (A-13). Choate then filed a Petition for Writ of Certiorari in the Oklahoma Supreme Court, which was denied by the Oklahoma Supreme Court on May 21, 1991.

SUMMARY OF ARGUMENT

FCB contends that this Court should decline to review the Memorandum Opinion because the Memorandum Opinion does not present any federal question for the Court's determination. This is a simple foreclosure case in which the District Court and the Court of Appeals were required to interpret the contract between FCB and Choate and apply Oklahoma law relating to contracts and property.

Choate apparently claims that federal questions exist because (i) he sought to join VA, a federal agency, as a party, and

(ii) he cites the Agricultural Credit Act of 1987 and claims that FCB denied to him the rights granted therein. The Court of Appeals plainly stated that it would not address either of these issues because Choate had not properly preserved them for review. Accordingly, this Court should decline review of the Memorandum Opinion for the further reason that the decision of the Court of Appeals rested on adequate and independent state grounds.

This Court should also decline to review the Stay Order because it does not involve a substantial federal question that has not been, but should be decided by this Court. To the contrary, this Court addressed the issues presented by the Stay Order in *Boone v. Lightner,* 319 U.S. 292, 76 S. Ct. 824, 100 L. Ed. 1587 (1943), which was properly followed by the Court of Appeals.

Additionally, the issues presented by the Stay Order are moot, thereby precluding review by this Court. The Stay Order had the effect of ordering Choate to file a petition for rehearing and a petition for writ of certiorari with the Oklahoma Supreme Court if he desired further review of the Memorandum Opinion. In fact, Choate did file a petition for rehearing and a petition for writ of certiorari, both of which were considered by the appropriate Oklahoma court. Accordingly, the issues presented by the Stay Order are moot because Choate complied with the order of the Court of Appeals.

REASONS TO DENY THE PETITION

As stated above, the Petition covers two separate orders of the Court of Appeals. Accordingly, the reasons to deny the Petition will be addressed first in connection with the applicable order sought to be reviewed, *i.e.*, the Memorandum Opinion or the Stay Order. The remaining sections of this response will address Choate's contentions as to why this Court should decide to review the issues set forth in the Petition.

I. This Court should deny the Petition as it relates to the Memorandum Opinion

A. The Memorandum Opinion does not present a substantial federal question for the Court's determination

This Court's jurisdiction to review a state court judgment is limited to the federal questions decided by the state court. *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 906-907, 102 S. Ct. 3409, 73 L.Ed.2d. 1215, *reh. denied*, 459 U.S.898, 103 S. Ct. 199, 74 L.Ed.2d. 160, (1982); 12 U.S.C.A. 1257. (West Supp. 1991)[10] Here, review of the Memorandum Opinion must be denied because there is simply no federal question presented for the Court's determination.

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[10] By its very terms, 28 U.S.C. 1257 confers jurisdiction upon this Court to review decisions of state courts in only three (3) instances, i.e., (i) if the validity of a treaty or a statute of the United States is drawn into question, (ii) if the validity of a state statute is drawn into question on the ground that it is contrary to the United States Constitution or a federal statute, or (iii) if a title, right, privilege or immunity is claimed under the United States Constitution or any United States Statute or treaty.

In the Memorandum Opinion, the Court of Appeals considered and addressed the following issues:

1. whether the $20,000.00 payment made by Choate in 1980 in exchange for the partial release of Mortgage prevented a determination that he was in default when he failed to make payments in 1985 and thereafter;

2. whether the Court of Appeals should consider arguments made in supplemental briefs filed in support of Amended Petitions in Error which contained no allegations of error and which were filed after completion of the briefing cycle without leave of court in violation of applicable court rules;

3. whether the trial court allowed the Oklahoma Attorney General to intervene to argue the constitutionality of the Moratorium Act;

4. whether Choate could argue that the trial court erred when it denied Choate leave to join the VA as a third-party defendant when Choate failed to include this allegation of error in his motion for new trial;

5. whether the alleged "right-of-way" Choate granted to himself shortly before the foreclosure action was filed was sufficient to grant to him a prior and superior claim to the Property;

6. whether Choate could raise a "trust claim" theory for the first time on appeal; and

7. whether the Court of Appeals should dismiss the appellants, John and Gretchan Choate from the

appeal due to their settlement with FCB and whether they could transfer any "appeal rights" to Choate after such dismissal.

The Memorandum Opinion does not include references to any portion of the United States Constitution, statutes or case law. This is a simple foreclosure proceeding involving issues of state substantive and procedural law only.

Choate attempts to convert the state issues into federal issues by arguing that the Note is governed by federal and state law. Actually, the Note provides that the permissible rate of interest is governed by federal law. The fact that the interest rate is governed by federal law is irrelevant to this case because Choate never claimed that the rate of interest was illegal or improper.

Choate also alleges that federal law is in issue because he was attempting to obtain refinancing "pursuant to 12 U.S.C. 2207(a), 38 U.S.C. 1802(A) and (d) and under the Farm Credit System Capital Corporation created by the 1985 Farm Credit Act." (Petition, p. 4)[11] The mere citation to these federal statutory provisions does not create a federal question because the fact that Choate was attempting to obtain financing elsewhere does not cure his default under the Note or prevent foreclosure of the Mortgage. Not only did the Court of Appeals not consider these arguments, Choate raised them in the appeal *only* in relation to his argument that the District Court erred when it disallowed intervention by the Oklahoma Attorney General.

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[11] These federal statutory provisions direct farm credit entities to prepare programs for young, beginning and small farmers or ranchers and establish the basic entitlement of Veterans to loans guaranteed by the VA.

Choate also refers to 12 C.F.R. 614.4510 (1980), claiming that it required FCB to release security for loans upon prepayment. Choate's reference to 12 C.F.R. 614.4510 does not create a federal question because it is undisputed that FCB did in fact release a portion of the property from the Mortgage. Choate's statement that FCB "ignored the partial release it was required to give according to federal law" is simply not true. Choate also cites 12 U.S.C.A. 2018 (West 1989) for the proposition that FCB should have released a portion of the Property from the Mortgage without any consideration whatsoever. Section 2018 provides that FCB may not make any loans in which the loan balance exceeds eighty-five percent (85%) of the appraised value of the property. This allegation does not create a federal question because it is simply not a defense to FCB's allegation that Choate defaulted under the Note. Furthermore, Choate's interpretation of this statutory provision is erroneous; he cannot seriously believe that 12 U.S.C.A. 2018 (West 1989) prohibits Farm Credit entities from making loans for less than eighty-five (85%) percent of the value of the property which serves as security for the loan.

Finally, in the Petition, Choate refers to an alleged denial of his rights provided by the Agricultural Credit Act of 1987, Pub.L.No. 100-233, codified at 12 U.S.C.A. 2001, et seq. (West 1989 & Supp. 1991) (the "1987 Act") which became effective January 6, 1988, eight (8) months after Judgment was rendered in favor of FCB. The Court of Appeals refused to consider Choate's argument that he was denied certain rights under the 1987 Act because this issues was not properly before the Court of Appeals. Obviously, this issue was not considered in either of the orders which Choate requests this Court to review. [12]

[12] The decision by the Oklahoma Court of Appeals, declining to review Choate's arguments relating to the Agricultural Credit Act as not properly before the court, did not prevent Choate from seeking review in other proceedings involving (continued)

In conclusion, this Court should decline to review the Memorandum Opinion because it does not present any federal question for the Court's consideration.

B. The Memorandum Opinion is supported by adequate and independent procedural and substantive state grounds

Pursuant to the "adequate and independent" state ground doctrine, this Court will not consider an issue of federal law if the state court judgment rests on a state law ground that is both "independent" of the merits of the federal claim and an "adequate" basis for the state court's decision. *Harris v. Reed*, 489 U.S. 255, 260, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989); *Michigan v. Long*, 463 U.S. 1032, 1038 fn. 4, 103 S.Ct. 3469, 77 L Ed.2d 1201 (1983). When federal rights are involved, if the state court's opinion contains a "plain statement" that it rests upon adequate and independent state substantive or procedural law, then review by this Court is precluded. *Harris v. Reed, supra,* 489 U.S. at 261. In this case, all issues considered by the Court of Appeals in the Memorandum Opinion rested upon adequate and independent procedural and substantive state grounds, thereby precluding review by this Court.

1. Procedural Grounds

As discussed at pgs. 11 and 12 of this brief, the Court of Appeals refused to consider several arguments made by Choate by specifically applying three rules of procedure. First, Choate

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[12] (continued) Choate and FCB. In an adversary proceeding filed by FCB against Choate in the United States Bankruptcy Court for the Western District of Oklahoma (Adv. No. 89-54-TS) the United States Bankruptcy Judge found that FCB had in fact complied with the Agricultural Credit Act. This decision is currently on appeal to the Tenth Circuit Court of Appeals. (Appeal No. 91-6266)

filed three "Amended" Petitions in Error (the "Amended Petitions") and a Supplemental Brief, purporting to support the Amended Petitions.[13]

The Court of Appeals refused to consider the arguments made in the Supplemental Brief because they were not set forth as issues or errors in any of the Amended Petitions. The Court of Appeals also declined to consider the substance of Choate's argument that the District Court erred when it did not allow Choate to join VA as a third party defendant in the action because Choate did not raise this issue in his Motion for New Trial. (A-6).[14] Finally, the Court of Appeals refused to consider a "trust theory" asserted by Choate for the first time on appeal.[15]

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[13] The decision by the Court of Appeals to review the allegations is in accordance with applicable Oklahoma law. *See Kirschstein v. Haynes*, 788 P2d 941 (Okla. 1990); *Martin v. Harrah Independent School Dist.*, 543 PP.2d 1370 (Okla. 1975); *Hall v. Pearson*, 203 Okl. 221, 219 P.2d 617, (1950); *Commissioners of Land Office v. Wood*, 202 Okl. 664, 217 P.2d 171 (1949); *Fowler v. Swank*, 78 Okl. 150, 189 P. 194 (1920); and *Southwestern Cotton Seed Oil Co. v. Bank of Stroud*, 12 Okl. 168, 70P. 205 (Okl 1902). Additionally, the Amended Petitions in Error were filed without leave of court, as required by Rule 1.17, Rule of Appellate Procedure in Civil Cases. The Amended Petitions in Error and the Supplemental Brief having been filed without permission, the Court of Appeals was not required to consider them on appeal. However, the Memorandum Opinion indicates that it relied on the former rule as the basis for its decision, *i.e.*, it considered the Amended Petitions but found that they did not present any allegations of error.

[14] This decision by the Court of Apeals followed established Oklahaoma statutory and case authority. See 12 O.S.§ 991 (b); *See also, Reeves v. Melton*, 518 P2d 57,64 (Okla. App. 1974)

The issues which were not considered by the Court of Appeals by reason of these procedural bars may not be considered by this Court. *See e.g. Exxon Corp v. Eagerton*, 462 U.S. 176, 181, fn. 3, 103 S. Ct. 2296, 2300 fn.3, 76 L Ed.2d 497 (1983). Even if the issues the Court of Appeals "clearly and expressly" refused to consider had constituted federal questions, Choate's failure to present the issues in conformance with state procedure constitutes an adequate and independent ground of decision barring review by this Court. *Harris v. Reed, supra*, 489 U.S. at 263.

2. Substantive State Grounds

In the Memorandum Opinion, the Court of Appeals applied state substantive law relating to contracts to determine that Choate's payment of $20,000.00 in 1980 did not serve to "prepay" the Note until 1994 or prevent a finding of default when he ceased making payments in 1985. The interpretation of a private contract is a question of state law, which this Court does not sit to review. *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468, 474, 109 S.Ct 1248, 103 L.Ed 488 (1989); *See, also, Black v. Cutter Laboratories*, 351 U.S. 292, 299, 76 S.Ct. 824, 828, 100 L.Ed. 1188 (1956), *rehearing denied*, 35 2 U.S. 859, 77 S.Ct. 21, 1 L.Ed.2d 69 (1956).

Additionally, the Court of Appeals considered state law

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[15] This decision is also in accordance with established Oklahoma law. *Reeves v. Agee*, 769 P2d 745 (Okla. 1989); *Faulkenberry v. Kansas City Southern Ry. Co.*, 661 P2d 510 (Okla. 1983), *cert. denied*, 464 U.S. 850, 104 S Ct. 159, 78 L.Ed.2d 146 (1983); *Davis v. Sams*, 542 P.2d 943 (Okl. 1975)

only when it addressed the issue of the prescriptive easement claimed by Choate by virtue of a "right of way" granted to himself after the FCB mortgage but before the Foreclosure Case was filed. Choate has never even raised any federal issues in connection with his claimed entitlement to the prescriptive easement.

FCB requests this Court to deny review of the Memorandum Opinion on the grounds that the decision of the Court of Appeals rested on adequate and independent state grounds.

II. The Petition must be denied as it relates to the Stay Order

A. When presented with the Application for Stay, the Court of Appeals properly applied the guidelines set by this Court

Admittedly, Choate relied upon a Federal statute, Section 521 of the Relief Act, when he submitted the Application for Stay. However, this Court should deny the Petition as it relates to the Stay Order because the Court of Appeals properly followed this Court's guidelines when considering the Application for Stay.

Pursuant to Section 521, a stay should be granted unless in the opinion of the court, the ability of the defendant to conduct his defense is not materially affected by reason of his military service. The decision to grant a stay is vested in the court to whom the application is presented. This discretion, "includes a discretion as to whom the court may ask to come forward with facts needful to a fair judgment." *Boone v. Lightner*, 319 U.S. 561, 570, 63 S.Ct. 1223, 878 L.Ed 1587 (1943) *rehearing denied*, 320 U.S. 809, 64 S.Ct. 26, 88 L.Ed. 489 (1943). The

mere showing that the applicant is in the military does not render a stay mandatory unless in the opinion of the court the ability to conduct the defense or prosecute the claim is materially affected by reason of the military services. *Id.*

Choate complains that he should not have been required to submit a statement from his commanding officer verifying his inability to participate in the appeal proceedings. Choate's allegations are contrary to this Court's decision in *Boone v. Lightner.*

Choate also imputes sinister motives to the Court of Appeals because it did not quote the language "on its own motion" when referring to Section 521 in the Stay Order. The words "on its own motion" are simply not relevant because Choate filed the Application for Stay; the Court of Appeals did not raise the issue *sua sponte.*

Furthermore, the Stay Order was not based upon the mere fact that Choate was a "voluntary augmentee." The only evidence presented by Choate to the Court of Appeals indicated that Choate is a lawyer who practiced law at the military level for forty-one days during the months of November and December, 1990. He was not required to appear before any court to obtain consideration of a petition for rehearing or a petition for writ of certiorari. All that was required of Choate was that he prepare a simple petition for rehearing and place it in the mail. The Court of Appeals properly weighed all of the facts before it, including Choate's unwillingness to provide the Court of Appeals with the requested verifying information, and concluded that Choate's ability to complete the appeal was not materially affected by reason of his military service.

B. The issues presented by the Stay Order are moot.

No justiciable controversy is presented to this Court when the question sought to be adjudicated has been rendered moot by subsequent developments. *University of Texas v. Camenisch*, 451 U.S. 390, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). A case is moot when the issues presented are no longer alive or the parties lack a legally cognizable interest in the outcome. *Los Angeles County v. Davis*, 440 U.S. 625, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979)

In the Application for Stay, Choate sought a stay of further proceedings in the appeal. Practically, the Application for Stay constituted a request by Choate that he not be required to file a petition for rehearing until after his military service had terminated. After reviewing Choate's military orders (which showed a termination of service on December 19, 1990), the Court of Appeals declined to stay the proceedings further and ordered Choate to file a petition for rehearing, if he so desired.

While Choate did not file his Petition for Rehearing within the time allowed by the Court of Appeals, it was still considered by the Court of Appeals. (A-13) Choate performed the precise act he was seeking to prevent, *i.e.*, filing a petition for rehearing. Perhaps the result would be different if Choate had not filed the Petition for Rehearing or a judgment by default had been rendered against him.

Compliance with a judicial decision or administrative order ordinarily renders a case moot. *See, e.g., Honig v. Students of California School for the Blind*, 471 U.S. 148, 105 S.Ct. 1820, 85 L.Ed.2d 114 (1985), in which this Court held that compliance

with the terms of a preliminary injunction rendered the issue of propriety of an injunction moot. *See, also, University of Texas v. Camenisch, supra.* Because Choate performed the very act which he sought to prevent, the issues presented by the Stay Order are moot and therefore not reviewable by this Court

III. The Court of Appeals did not decide important questions of federal law which have not been and should be addressed by this Court

In Proposition I of the Petition, Choate states, "[t]he Court of Appeals erred in deciding questions of substance with no citations of authority heretofore determined by this court." Presumably, Choate is attempting to rely on Rule 10.1(a)(c), Rules of the Supreme Court, which states that a special and important reason for granting certiorari may be found if a state court decides an important question of federal law which has not been, but should be, settled by this Court.

Under this proposition, Choate discusses his theory that the trial court erred in holding that the $20,000.00 payment did not prevent his default under the Note. The interpretation of the Note is a matter of state law which does not involve a federal question. Choate's apparent assertion that the Court of Appeals denied the Application for Stay "with no citation of authority from this court" is incorrect. As shown by the Stay Order, the Court of Appeals specifically relied on *Boone v. Lightner* in its review of the Application for stay and properly followed the guidelines set forth therein.

prior decisions by this Court

In Proposition II, Choate asserts that the Court of Appeals "erred in a way not in accord with decisions of this Court and the Supreme Court of the United States as to rights of borrowers who are in the military service." In this Proposition, Choate addresses the District Court's allowance of the Oklahoma Attorney General to withdraw from the Foreclosure Case as well as its refusal to allow Choate to join VA as a third-party defendant. Choate also argues that FCB's purported pledge of the Note and Mortgage as security for "no-call" bonds prevented FCB from collecting the Note. Throughout this entire discussion, Choate also refers to the Capital Corporation.

Interestingly, while Choate contends that the decision of the Court of Appeals relating to these issues was not in accordance with decisions of this Court, he does not cite any of these alleged decisions. From the beginning of the Foreclosure Case to the proceedings on the Petition before this Court, Choate has never pointed out any authority from this Court or any Court that would lend credence to the issues raised in the Petition. Moreover, FCB has not been able to find any contrary authority from this Court whatsoever.

CONCLUSION

FCB respectfully requests this Court to deny the Petition.

Respectfully submitted,

G. Blaine Schwabe
(counsel of record)
Of the Firm:
Mock, Schwabe, Waldo,
Elder, Reeves & Bryant
A Professional Corporation
Fifteenth Floor
One Leadership Square
211 North Robinson Avenue
Oklahoma City, OK 73102
Telephone: (405) 232-5481

ATTORNEYS FOR THE FARM
CREDIT BANK OF WICHITA

NO. 91-548
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

WILLIAM W. CHOATE, PETITIONER

versus

THE FEDERAL LAND BANK OF WICHITA,
NKA THE FARM CREDIT BANKOF WICHITA,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT
OF THE STATE OF OKLAHOMA

APPENDIX TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

*G. Blaine Schwabe, III
***Counsel of Record**
Mary S. Robertson
MOCK, SCHWABE,
WALDO, ELDER, REEVES & BRYANT
A Professional Corporation
Fifteenth Floor
One Leadership Square
211 North Robinson Avenue
Oklahoma City, OK 73102

Stanley Huser, Jr.
104 North Broadway
P. O. Box 509
Holdenville, OK 74848-0511